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In The

Supreme Court of the United States

October Term, 1994

ARMANDO DAMIAN, M.D. AND
DAMIAN CLINIC, INC.,

Petitioners,

v.

CHARLES GALAYDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio scheme for awarding prejudgment interest violates the Due Process Clause of the Fourteenth Amendment when it permits an award of prejudgment interest in a manner that (a) punishes a defendant's exercise of his constitutional right of access to the judicial process and (b) does not apply equally to plaintiffs and defendants.

RULE 29.1 STATEMENT

Petitioner Damian Clinic, Inc. states that it has no parent company and that it has no subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Armando Damian, M.D., and Damian Clinic, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Appendix, *infra*, App. 1) is reported at 71 Ohio St. 3d 421, 644 N.E.2d 298. The opinion of the Cuyahoga County Court of Appeals (App. 28) is unreported. The judgment entry

of the Cuyahoga County Court of Common Pleas, granting plaintiff's motion for prejudgment interest (App. 89) is unreported.

JURISDICTION

The Ohio Supreme Court issued an opinion in this case on December 30, 1994. A timely motion for reconsideration was denied on February 15, 1995. 71 Ohio St. 3d 1467, 644 N.E.2d 1389. (*See* App. 106.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

Petitioners, a physician and his medical clinic, come before this Court bearing the severe burden of an award of prejudgment interest of nearly $2,000,000, an amount that is more than two-thirds of the underlying judgment against them. That burden was imposed by the trial court as a punishment for petitioners' having exercised their constitutional right of access to a judicial determination of the claims against them, rather than settling the claims

out of court. This imposition of punishment for the exercise of constitutional rights violates the most basic principles of the Due Process Clause.

As is true in an overwhelming majority of the States, Ohio law provides for an award of prejudgment interest in certain civil actions. Ohio Rev. Code § 1343.03(C). The Ohio scheme for these awards is intended to encourage settlement by permitting an award of prejudgment interest against defendants who lose at trial and who thereafter are found not to have acted in good faith with respect to possible pretrial settlement.

Such an incentive is on its face unobjectionable. And, until the opinion of the Supreme Court of Ohio in this case, the application of the statute had been guided by constitutionally compelled doctrines announced by that court. These doctrines ensured that awards of prejudgment interest did not penalize or infringe on a defendant's constitutional right to try, rather than settle, disputed claims within the judicial process prescribed by the Ohio Constitution. *See* Ohio Const., art. IV, § 1.

Of critical importance to preserving the constitutionality of Ohio's system was a proviso expressly articulated by the Supreme Court of Ohio in the controlling case on the issue: "If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Kalain v. Smith*, 25 Ohio St. 3d 157, 495 N.E. 2d 572, syllabus (1986).[1] This

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[1] In Ohio, the syllabus has the force of law and expresses the holding of the Court. Ohio R. Rep. Op. (1)(B).

critical proviso allowed Ohio's system for awarding prejudgment interest to encourage settlement without infringing on constitutional rights. Ohio law under *Kalain* required good faith efforts at settlement, a laudable objective, and permitted the imposition of prejudgment interest when a party failed to fulfill its obligations in that regard. Such a failure might include the use of dilatory techniques to postpone settlement or trial, the subversion of litigation through misconduct in pretrial discovery, or even the failure to make a monetary settlement offer when liability was clear. *See, e.g., Kalain, supra; Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 590 N.E.2d 737 (1992).

The holding in *Kalain* made clear, however, that an award of prejudgment interest could not be predicated on the failure to make a settlement offer if the defendant was acting in good faith and seeking only to exercise the constitutional right of access to a judicial determination of disputed claims, the means afforded by the State of Ohio for the resolution of disputes over liability for tort injuries.

In the present case, however, this coherent and constitutionally permissible scheme was rejected; in its place the Supreme Court of Ohio has erected a raw, vindictive, and one-sided scheme that permits the punishment of defendants such as petitioners, who choose reasonably and in good faith to submit the issue of their liability to the State-prescribed method of adjudication. Under the rule announced by the Supreme Court of Ohio in its opinion in this case, prejudgment interest can be awarded against a defendant solely because he failed to make a settlement offer. Such an award is punitive because it

exacts from the defendant a monetary penalty unrelated to compensation of the plaintiff; and the punishment is unconstitutional because it is directed, not at unlawful or socially abhorrent behavior, but at the exercise of a constitutionally-protected right: the right of access to judicial process.

The Ohio scheme offends the Due Process Clause further because it is one-sided: it does not treat plaintiffs and defendants equally. A plaintiff who makes no settlement demand, and who thereafter loses at trial, is not subject to sanction for having proceeded; and the defendant who incurs all of the costs of litigation as a result of the plaintiff's failure faces no prospect of receiving compensation for those costs.

The right of access to judicial process is an elemental strand of the Due Process Clause. Far from limiting that right, the constitutional system in Ohio enshrines it: the State's Constitution itself proclaims that the right to trial by jury shall be "inviolate", Ohio Const., art. I, § 5, and a separate provision of the Constitution ensures that courts shall remain open. Ohio Const., art. I, § 16. Alas, Ohio's system for the imposition of prejudgment interest breaks these promises. The resulting system interferes not only with the state constitutional rights, but with the federal right of access secured by the Due Process Clause.

1. The respondent's claim against petitioners.

Respondent filed this action against several physicians and medical service providers, alleging that they had rendered negligent medical care to him following his

involvement in a near-fatal automobile accident. In particular, respondent claimed that petitioner did not act within acceptable standards of care in several respects, including the alleged failure to perform certain diagnostic procedures during surgery.

Petitioners resisted the liability claims on the ground that their conduct conformed to accepted medical standards. Specifically, they contended that the procedures in question were not required for any diagnostic purpose; and, further, they contended that the decision to forgo the procedure in question was medically appropriate in light of the severity of respondent's injuries and the urgent need for surgical repair. These contentions were supported by competent expert testimony and other proofs that were sufficient to require submission of the case to the jury because reasonable minds could differ on the question of liability.

2. The trial court's award of prejudgment interest.

The jury returned a verdict finding petitioners liable on plaintiff's claims of medical negligence. The trial court then added to the verdict an award of prejudgment interest, which was to accrue pursuant to the statute at the judgment rate from the date of the plaintiff's injury. In determining to make the award of interest, the trial court rested entirely on its view that the existence of a genuine question about liability, rather than shielding defendants from penalty, was itself a reason for imposing the penalty. (App. 89.)

In particular, according to the trial court, a failure to make any settlement offer would be permissible only "where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best." (App. 100.) Thus, whether or not a defendant believed in good faith that it was liable, it was nonetheless required to make an offer of settlement if there was some appreciable risk that a jury would find liability: "It is not prudent, however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent." (App. 100-01.)

3. The Ohio Supreme Court's affirmance of the award.

On appeal, the Ohio Supreme Court affirmed the trial court's award of prejudgment interest, rejecting petitioners, statutory and constitutional challenges to the award. App. 9-13.[2] The Ohio court rejected petitioners' contention that prejudgment interest under the Ohio statute was punitive, declaring it to be "wholly compensatory" in that it afforded compensation for the loss of use of funds occasioned by the defendants' " 'failure . . . to negotiate in good faith.' " App. 10, *quoting Digital & Analog Design Corp., supra*, 63 Ohio St. 3d at 660-661, 590

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[2] While the Ohio court's opinion upheld the award as consistent with the due process and jury trial guarantees of the Ohio Constitution, petitioner's challenge had expressly rested on both the Ohio and the federal Constitutions.

N.E.2d at 746. In view of its asserted compensatory purpose, the court said, the statutory scheme did not unconstitutionally penalize or burden the defendants' right to a judicial determination of the claims against them.

Moreover, the Ohio court held that the trial court's definition of the standard for prejudgment interest liability was correct, notwithstanding the rule adopted in *Kalain* that a defendant's failure to offer settlement could not be sanctioned if the defendant held a good faith and reasonable belief that he was not liable. Thus, the court said, a defendant who failed to offer settlement could be held liable for prejudgment interest whenever there was "credible" evidence of negligence and the plaintiff's injuries were "arguably" attributable to the defendant's conduct. App. 14.

REASONS FOR GRANTING THE PETITION

The right of access to courts for the resolution of disputes is both fundamental and constitutional. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964). Among the core reasons for the very existence of civil society is the provision of a means for the peaceful decision of conflicting claims of right. State rules of law that prevent or impair access to the state's monopoly on dispute resolution deny due process of law to plaintiffs when they pose unreasonable barriers to the making or

proof of a claim. And they deny due process to defendants when they penalize the pursuit of a judicial determination of disputed claims of liability. "Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend.' " *Boddie*, 401 U.S. at 377, *quoting Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

As construed and applied by the Ohio Supreme Court in this case, Ohio's prejudgment interest scheme imposes a penalty, in an amount unrelated to compensation, on a losing defendant who in good faith insists on exercising the constitutional right to a judicial determination of liability. The Ohio scheme, moreover, imposes that penalty in a wholly one-sided fashion, without any corresponding sanction for the plaintiff who fails to engage in settlement.

I. THE RULE ANNOUNCED IN THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY UNILATERALLY PENALIZING DEFENDANTS FOR THE EXERCISE OF THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS.

The question presented to this Court is whether this punitive and one-sided system is consistent with the Due Process Clause of the United States Constitution. It is not.

When a claim is made against a defendant, there may be much to be gained from settlement, from working out a mutually satisfactory resolution of the dispute. The public values of private ordering undoubtedly permit the states to create incentives for settlement, and they likewise permit at least some imposition of the costs of

litigation on those who resort to it. Moreover, it is certainly within the power of the states to punish those who misuse or abuse the apparatus of state-sponsored dispute resolution, by pursuing meritless claims or defenses in bad faith, for example, or by litigating solely for purposes of harassment or delay.

All of these principles are truisms. But they neither explain nor justify Ohio's system of prejudgment interest as it has been authoritatively construed by the Ohio Supreme Court in this case.

Under the Ohio system, a losing defendant is required to pay prejudgment interest if he failed to make or respond to settlement offers. The liability is avoided only if the defendant believed that he had no liability *and* if a "reasonably prudent trial lawyer" would have regarded the possibility of an adverse verdict as "nonexistent" or "barely marginal at best." The amount of the liability for prejudgment interest is measured by the entire amount of the judgment, and it accrues from the date of injury, rather than from the date of the failure to settle.

This scheme undoubtedly burdens the right to insist on a judicial resolution of the plaintiff's claims against the defendant. Such a burden is unconstitutional. As this Court held in *Boddie*, where the judicial proceeding is "the only effective means of resolving the dispute at hand", the defendant is constitutionally entitled to access to that proceeding. *Boddie*, 401 U.S. at 377. In *Boddie*, this Court struck down a state scheme that conditioned access on the ability to pay. Ohio's scheme for prejudgment

interest likewise fails, because it punishes those who exercise that same right of access.

As with the petitioners in *Boddie*, tort defendants in Ohio are forced to settle "their claims of right and duty through the judicial process." *Id.* Yet, the defendant who declines to settle and chooses instead to exercise his right to trial does so at the substantial peril of being liable not only for the plaintiff's injuries but for an award of prejudgment interest as well. This liability cannot be avoided by a good faith and reasonable belief that there is no liability on the underlying claim. Rather, an award of interest is avoided only if the risk of losing on the underlying claim is "nonexistent" or "barely marginal."

Faced with a triable claim, then, a defendant is required to substitute actuarial analysis of the claim in place of a determination whether it is meritorious: if there is some appreciable risk of losing, the defendant must forgo judicial resolution and settle, or else pay an interest penalty for having pursued judicial resolution. Even a defendant wholly (and reasonably) convinced of the legal and factual soundness of his position cannot safely proceed to trial unless the plaintiff's claim is so weak as to be subject to dismissal or summary disposition before trial. Thus, the prejudgment interest penalty drastically constrains a decision that is protected by the Constitution.

The interest penalty is, moreover, unrelated either to the costs of litigation or to compensation of the plaintiff for the failure to settle. The Ohio system certainly does not internalize to the parties the costs of litigation, as is the case, for example, with rules imposing jury fees and

similar court costs on the losing party. An award to the plaintiff of prejudgment interest on the entirety of the verdict neither recoups the state's costs of administering justice nor is even measured by reference to those costs.

Similarly, the award does not compensate the prevailing party but is, rather, punitive in its structure. Notwithstanding the Ohio court's declaration that an award of prejudgment interest is "wholly compensatory," the amount of the award is in fact not determined by the loss accruing to the plaintiff from the failure to settle. In this respect, Ohio appears to be unique among the American jurisdictions that permit an award of prejudgment interest for a failure to settle: in each of the other jurisdictions, the amount of the award is calculated by reference to the time at which the defendant should have settled, thereby compensating the plaintiff for the loss actually caused by the failure to settle.[3]

In Ohio, by contrast, the award is calculated on the whole verdict and reaches back to the date of injury. Because it thus has no basis in the loss caused by the specific conduct deemed to be objectionable (that is, the failure to settle), the award is necessarily punitive in character.

Further, the Ohio system, whether characterized as compensatory or punitive, is wholly one-sided: only defendants bear the risk of sanction for a failure to settle. A plaintiff who makes no effort to settle, and who loses at

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[3] *See, e.g.*, Colo. Rev. St. § 13-17-202; Conn. Gen. St. Ann. § 52-192a; Fla. St. Ann. § 45.061; Idaho Code § 12-301; Minn. St. Ann. § 549.09; Mo. St. Ann. § 408-040; Nev. St. Ann. § 17.115.

trial, faces no sanction at all under the Ohio system. In contrast, a defendant who makes no effort to settle faces the palpable, and often severe, sanction of an award of prejudgment interest on the entire judgment.

These characteristics of the Ohio system – its punitive quality, and its one-sidedness – are the source of its constitutional infirmity. Ohio undoubtedly could establish, consistently with the Constitution, a system of prejudgment interest that compensated parties for the losses occasioned by the delays inherent in judicial dispute resolution, or one that punished abuses of the litigation system.

There could be no serious objection, for example, to a regime that provided for prejudgment interest on all judgments, or on all judgments involving particular kinds of claims. Similarly unobjectionable would be a rule that imposed liability for prejudgment interest for a failure to settle, with the amount of the interest calculated from the date of the failure. Likewise permissible would be a system that imposed liability for prejudgment interest, even from the date of the injury, if the defendant proceeded to trial in bad faith or without any triable defense to the plaintiff's claim.

The first two of these schemes would be compensatory, and the third, though punitive, would punish abuse of the litigation system, rather than its legitimate use. The flaw in the Ohio system is that it applies a punitive sanction to conduct that cannot constitutionally be punished.

The system provides for interest from the date of injury, but it does so only as to some defendants, and the

sole criterion for selecting between those who are and are not liable is whether the defendant has exercised his constitutional right to a judicial resolution of the claim against him. The system thus neither compensates for the delays caused by non-settlement nor compensates non-discriminatorily for the loss of use of funds from the date of injury. Instead, the system affords the latter "compensation" only against defendants who have chosen to exercise a fundamental constitutional right.

However broad a state's powers may be in constructing incentives to settlement, those powers may not be exercised to punish the exercise of constitutional rights. *See, e.g., Shapiro v. Thompson* (1969), 394 U.S. 618, 631 *quoting United States v. Jackson* (1968), 390 U.S. 570, 581 ("If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' ").

The Ohio prejudgment interest scheme at issue in this case imposes a one-sided penalty on a defendant's good faith exercise of the fundamental right to resort to the courts for dispute resolution. It forces a defendant to give up meritorious defenses, to forgo a neutral adjudication, and to compromise the underlying rights themselves, in any case in which as a matter of probabilities there is a greater than "marginal" chance that the plaintiff will prevail. At the same time, it imposes no similar burdens or risks on recalcitrant plaintiffs.

The values of settlement are undeniable. But they are hardly absolute. *See generally* Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Galanter and Cahill, "Most Cases

Settle": Judicial Promotion and Regulation of Settlements, 46 Stanford L. Rev. 1339 (1994). The system of judicial dispute resolution exists precisely because there are situations in which the existence of a legal right is a matter of legitimate dispute. That system is constitutionally grounded, and resort to it is constitutionally protected, in order to provide a means for the protection and vindication of legal rights. Where "interests of basic importance are involved, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, n. 5 (1982), *quoting Boddie*, 401 U.S. at 377.

Ohio lacks a state interest of countervailing significance sufficient to justify the infringement on this fundamental right that its prejudgment interest scheme entails. The Ohio system inverts the constitutional scheme, punishing the defendant whenever there is a genuine question for resolution and withholding punishment only when the merits of the defendant's position are so obvious that a trial is not needed to establish them. The Ohio system, as construed and applied by the Ohio Supreme Court in this case, violates the Due Process Clause of the Fourteenth Amendment. It cannot stand.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

Respectfully submitted,

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GALAYDA, APPELLEE, *v.* LAKE HOSPITAL SYSTEMS, INC., F.K.A. LAKE COUNTY MEMORIAL HOSPITALS, INC.; DAMIAN ET AL., APPELLANTS.

[Cite as *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421.]

Statement of the Case

1. R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages award in excess of $200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause (Section 16, Article I) of the Ohio Constitution.

2. R.C. 1343.03(C), which authorizes an award of pre-judgment interest in a tort action against a defendant who failed to act in good faith to settle, does not violate either the Due Process Clause (Section 16, Article I) or the Right to Jury Trial Clause (Section 5, Article I) of the Ohio Constitution by imposing a penalty for exercise of that right.

(No. 93-2276 – Submitted September 21, 1994 – Decided December 30, 1994.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 63151.

On the morning of June 18, 1988, plaintiff-appellee Charles Galayda ("plaintiff") lost control of his minivan and hit a tree. He was transported to Lake County Hospital East by ambulance at 3:30 a.m.

While at Lake County Hospital, plaintiff underwent three operations which were performed by appellant, Dr.

Armando B. Damian. During each of these procedures, Dr. Damian observed bile staining within the abdominal cavity. On each of these occasions, Dr. Damian visually examined the common bile duct by performing a Kocher maneuver. However, at no time did Dr. Damian order a cholangiogram, in which dye is injected into the bile duct system, which is then X-rayed to find leaks or injuries.

After the third surgery on July 6, 1988, plaintiff developed a high fever, gastrointestinal bleeding and adult respiratory syndrome. On July 12, 1988, Dr. Damian transferred plaintiff to Cleveland Metropolitan General Hospital, n.k.a. Metro Health Medical Center, by Life-flight helicopter. Plaintiff was treated by Dr. Marc Eckhauser and Dr. Allen Cohen, who found a large volume of blood in his stomach. On July 13 and 14, 1988, Dr. Eckhauser performed two surgeries, removing part of plaintiff's stomach and a substantial amount of dead intestine. During the first of these operations, Dr. Eckhauser observed bile staining in the area of the pancreas, beneath the liver and around the bowel.

On July 20, 1988, Dr. Cohen performed a cholangiogram and discovered a leak in the common bile duct. Dr. Cohen bypassed the leak in order to give the common bile duct time to heal itself. Plaintiff was discharged from Cleveland Metro on November 10, 1988, but without the use of his left eye. He was rendered sightless in that eye as the result of infection which originated in the area of his abdominal surgeries. In addition, his surgeon, Dr. Eckhauser, described plaintiff as being a potential "gastrointestinal cripple" as a result of the removal of sections of his intestine and stomach.

Plaintiff commenced an action for medical malpractice in the Court of Common Pleas of Cuyahoga County on April 26, 1989 against Dr. Damian, Damian Clinic, Inc. ("defendants") and several other medical care providers who are not parties to this appeal. Following a trial in July 1991, the jury rendered a unanimous verdict in favor of plaintiff in the total amount of $2,781,710. In answering interrogatories submitted to it, the jury specifically found that the defendants, Dr. Damian and Damian Clinic, Inc., failed to meet the standards of care required of them by failing to order a cholangiogram in any of plaintiff's operations and by failing to transfer him to a hospital capable of treating his injuries. The jury awarded plaintiff $800,000 as past damages and $1,981,710 in future damages, of which $1,396,125 was designated as compensation for pain and suffering and $585,585 represented lost wages.[1]

Defendants timely filed a joint motion for periodic payments of future damages pursuant to R.C. 2323.57(C). Contemporaneously, plaintiff filed a motion for prejudgment interest pursuant to R.C. 1343.03(C). The trial court granted plaintiff's motion for prejudgment interest. However, the trial court found R.C. 2323.57, which provides for the periodic payment of future damages, to be unconstitutional, and therefore denied the defendants' motion.

The Eighth District Court of Appeals, in a unanimous opinion, affirmed the judgment of the trial court.

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[1] Plaintiff sought no compensation for future medical expenses.

This cause is now before this court pursuant to the allowance of a motion to certify the record.

A. WILLIAM SWEENEY, J. R.C. 2323.57[2] mandates that, upon timely motion of a party, awards of future damages in excess of $200,000 be paid periodically rather than in a lump sum in medical malpractice claims. R.C.

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[2] R.C. 2323.57 provides, in part:

"(C) [I]f the total of the future damages described in division (B)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment in accordance with Civil Rule 58, the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. *If such a motion is timely filed, the court shall include* in the journal entry *an order that* includes all of the following:

"(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum * * *;

" * * *

"(2) A requirement that the *future damages in excess of the two hundred thousand dollars paid in a lump sum * * * be used to fund a series of periodic payments over a period of time* in accordance with divisions (D), (E), and (F) of this section." (Emphasis added.)

The full text of R.C. 2323.57 is reproduced as an appendix to this opinion.

1343.03(C),[3] Ohio's prejudgment interest statute, provides for an award of interest to be granted in favor of successful tort plaintiffs, when the trial court finds that the defendant failed to act in good faith to achieve pretrial settlement of the dispute. We are called upon in this case to determine the constitutionality of each of these statutes. We affirm the findings of the lower courts that R.C. 1343.03(C) survives a constitutional challenge, while R.C. 2323.57 does not.

I

Constitutionality of Ohio's Periodic Payment of Future Damages Statute

Both lower courts found that R.C. 2323.57 violates the Right to Jury Trial Clause of Section 5, Article I and the Due Process Clause of Section 16, Article I of the Ohio Constitution. For the reasons which follow, we affirm.

Section 5, Article I of the Ohio Constitution provides that:

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[3] R.C. 1343.03(C) provides as follows:

"Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to when the money is to be paid did not fail to make a good faith effort to settle the case."

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

It is well established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 421, 633 N.E.2d 504, 510; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743, 746; and *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3. This court has held there is a fundamental constitutional right to a trial by jury in negligence actions. *Sorrell, supra,* 69 Ohio St.3d at 422, 633 N.E.2d at 510; *Kneisley, supra,* 40 Ohio St.3d at 357, 533 N.E.2d at 746. Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled. *Sorrell, supra,* 69 Ohio St.3d at 422, 633 N.E.2d at 510.

R.C. 2323.57(C) requires a trial judge, upon timely motion of any party, to order that any future damages award which exceeds $200,000 be paid in periodic installments rather than in a lump sum upon entry of judgment. Moreover, R.C. 2323.57(E)(2) provides, in pertinent part, that "[t]he total amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment." R.C. 2323.57(F)(1) further mandates that, if a plaintiff dies prior to the receipt of all of the periodic payments, all payments for future medical expenses and for noneconomic loss, such as pain and suffering, loss of consortium, disfigurement, mental anguish and any other intangible loss, shall cease.

In Ohio, a plaintiff is entitled to an award of damages to compensate him for losses which he is reasonably certain to incur in the future. *Pennsylvania Co. v. Files* (1901), 65 Ohio St. 403, 407, 62 N.E. 1047, 1047; *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, 16 OBR 355, 475 N.E.2d 797. Under the common law of Ohio, future damages must be rendered to present value, and a defendant is entitled to a jury instruction to that effect. *Maus v. New York, Chicago & St. Louis RR. Co.* (1956), 165 Ohio St. 281, 59 O.O. 366, 135 N.E.2d 253, paragraph one of the syllabus. Thus in Ohio, a jury is to return a verdict not in an amount reflecting the actual damages it deems to be reasonably certain to occur in the future, but rather in a reduced amount representing the present value of those actual damages.

It is evident that application of R.C. 2323.57 to a jury verdict does not merely mandate the *manner* in which a judgment shall be paid; rather, it requires the trial court to further reduce the jury's award of damages already once reduced to present value. Application of the statute quite simply results in a successful plaintiff's receiving less than the jury awarded, and deprives the most severely injured victims of the benefits of investment.

That R.C. 2323.57 regulates more than merely the manner in which a judgment is paid and instead reduces the actual value of the verdict can be illustrated by comparing two hypothetical plaintiffs, both of whom receive future damages awards of $1,000,000. Assume the first plaintiff receives his entire judgment in a lump sum, but determines to use the proceeds to purchase an annuity. Assume the second plaintiff is subjected to application of R.C. 2323.57. Obviously the stream of income produced

by investment in an annuity by the first plaintiff of the entire $1,000,000 will exceed the payout generated in the second case, where the entirety of the judgment (except the first $200,000) will be received in the future with no regard for the effect of inflation and no interest or other investment appreciation. This is assured by application of R.C. 2323.57(E)(2), which specifically provides that "[t]he total [lump sum] amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment." It is readily apparent that R.C. 2323.57 effectively reduces a jury's award without the consent of the plaintiff.[4]

For the foregoing reason, we find that R.C. 2323.57(C) invades the jury's province to determine damages, and that the statute violates a plaintiff's right to trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.

Nor is R.C. 2323.57 consistent with the Due Process Clause of the Ohio Constitution. Section 16, Article I of the Ohio Constitution guarantees that every person who suffers a legally compensable injury "shall have remedy by due course of law." This provision is the equivalent of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 544, 21 O.O. 422, 424, 38 N.E.2d 70, 72.

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[4] Legislatively imposed remittiturs may well violate the doctrine of separation of powers. See *Murphy v. Edmonds* (Md.1992), 325 Md. 342, 380, 601 A.2d 102, 120 (Chasanow, J., dissenting), citing *Sofie v. Fibreboard Corp.* (1989), 112 Wash.2d 636, 652-654, 771 P.2d 711, 720-721.

The trial court found R.C. 2323.57 to be "unreasonable, arbitrary, and [to have] no reasonable relationship to any good which may have been perceived by the Legislature to benefit the public health and welfare." The court of appeals concurred that R.C. 2323.35 is unconstitutional based upon due process grounds. We agree with the lower courts that R.C. 2323.57 violates the Due Process Clause of the Ohio Constitution for the reasons set forth in *Sorrell, supra.* There is insufficient evidence of a relationship between tort reform legislation and the availability or affordability of medical malpractice insurance. *Id.*, 69 Ohio St.3d at 423, 633 N.E.2d at 511.

Therefore, we hold that R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages award in excess of $200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause of Ohio Constitution (Section 16, Article I).

II

Constitutionality of Ohio's Prejudgment Interest Statute (R.C. 1343.03)

This court recently analyzed Ohio's prejudgment interest statute at length in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, but we were not in that case called upon to consider the constitutionality of R.C. 1343.03. The defendants herein make essentially the same argument we rejected in *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 160, 25 OBR 201, 203, 495 N.E.2d 572, 574, *i.e.*, that imposing a "good faith effort to

settle" requirement forces a defendant to forgo the right of having a jury determine the existence of his liability in tort.

We reaffirm our holding in *Kalain* that "R.C. 1343.03(C) does not infringe upon a party's right to a jury trial." *Id.* at 160, 25 OBR at 203, 495 N.E.2d at 574. It is true that a defendant who chooses to try a case before a jury rather than settle it risks the possibility that he may ultimately be found liable for a larger total judgment if prejudgment interest is awarded. However, the potential application of R.C. 1343.03 in no way precludes a defendant from insisting on exercising his right to trial by jury nor does it "create a financial barrier that prevents a * * * party from taking his case to a jury." *Kuenzer v. Teamsters Union Local 507* (1981), 66 Ohio St.2d 201, 203, 20 O.O.3d 205, 207, 420 N.E.2d 1009, 1011, fn. 6. The defendant's right of access to a jury for determination of factual issues remains unimpaired.

We similarly reject defendants' contention that R.C. 1343.03 imposes a penalty upon defendants for having exercised their right to a jury where prejudgment interest is awarded against them. In *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737, we found such an award to be compensatory in nature rather than punitive. Writing for the majority, Justice Wright noted that the "prejudgment interest statute is designed to compensate the aggrieved party for the delay encountered by the failure of the tortfeasor to negotiate in good faith," and "ensures that just compensation to the tort victim is not eroded by the dilatory tactics of the tortfeasor. * * * " *Id.* at 660-661, 590 N.E.2d at 746. In such a case, the defendant "allow[s] the interest monies on the

[defendant's monetary reserves] to accumulate to the benefit of the party required to pay and to the detriment of the party to whom the money is to be paid." *Dailey v. Nationwide Demolition Derby, Inc.* (1984), 18 Ohio App.3d 39, 41, 18 OBR 108, 110, 480 N.E.2d 110, 112. Where a defendant benefits monetarily as a result of failing to negotiate possible settlement in good faith, R.C. 1343.03 does not constitute a penalty, but, to the contrary, is wholly compensatory, and indeed equitable, in nature.

Similarly, it is the jury's function to determine the amount of damages suffered by a plaintiff. Since determining the amount of prejudgment interest awards is entirely separate and distinct from determining the amount of damages suffered by the plaintiff, and does not involve questions of fact, R.C. 1343.03 does not violate the fundamental constitutional right to trial by jury.

Defendant's contention that R.C. 1343.03 violates the Due Process Clause of the Ohio Constitution is unfounded. Prejudgment interest statutes have consistently been found to be constitutional by courts both in Ohio and elsewhere. See, *e.g., Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222, 14 OBR 250, 470 N.E.2d 941; *Mills v. Dayton* (1985), 21 Ohio App.3d 208, 21 OBR 222, 486 N.E.2d 1209; *Edgerson v. Cleveland Elec. Illum. Co.* (1985), 28 Ohio App.3d 24, 28 OBR 34, 501 N.E.2d 1211. See, generally, Annotation, Validity and Construction of State Statute or Rule Allowing or Changing Rate of Prejudgment Interest in Tort Actions (1985), 40 A.L.R.4th 147. While this is not dispositive of our inquiry, we do agree with the overwhelming weight of authority that prejudgment interest statutes are rationally related to the legitimate goals of encouraging prompt resolution of disputes,

and ensuring prompt payment of compensation to parties injured by tortious conduct.

For the foregoing reasons, we hold that R.C. 1343.03(C), which authorizes an award of prejudgment interest in a tort action against a defendant who failed to act in good faith to settle, does not violate either the Due Process Clause (Section 16, Article I) or the Right to Jury Trial Clause (Section 5, Article I) of the Ohio Constitution by imposing a penalty for exercise of that right.

The defendants further contend that the trial court improperly applied the standards established in *Kalain* in awarding prejudgment interest to plaintiff. The defendants assert that prejudgment interest cannot be awarded if a motion for summary judgment or directed verdict could not have been appropriately granted in plaintiff's favor on the issue of liability. Defendants contend that in such circumstances reasonable minds could differ on the issue of liability, thereby necessitating the conclusion that the defendant had a good faith, objectively reasonable belief of nonliability and was thus not required to make a monetary settlement offer or counteroffer. The defendants base this argument on the last sentence of the syllabus in *Kalain*, which states: "If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.*, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572.

We decline to impose summary judgment or directed verdict analytical criteria on prejudgment interest proceedings. Existence of a good faith, objectively reasonable belief of nonliability does not excuse a defendant from the remaining *Kalain* obligations to (1) fully cooperate

with discovery, (2) rationally evaluate risks and potential liability, and (3) refrain from unnecessary delaying maneuvers. *Id.*, at syllabus. Moreover, the "good faith, objectively reasonable belief" language of *Kalain*, must be "strictly construed so as to carry out the purposes of R.C. 1343.03." *Moskovitz*, 69 Ohio St.3d at 659, 635 N.E.2d at 348. The purposes of R.C. 1343.03 would not be furthered by construing the evidence most favorably to the party opposing a motion for prejudgment interest as a trial court must do when ruling on a motion for directed verdict or summary judgment, or by limiting the examination of the defendant's conduct to the time of the trial or the evidence presented at trial. A defendant may well have fallen short of the good faith requirement of R.C. 1343.03, even where a trial court would have been justified in overruling a motion for summary judgment prior to trial or a motion for directed verdict made during trial.

We have reviewed the record established in the prejudgment interest hearing held in the case at bar and find that the trial court was well within its discretion in ordering prejudgment interest pursuant to R.C. 1343.03. The trial court found that the defendants had stated a position of "no offer and no settlement in such unmistakably rigid terms" following presentation of plaintiff's initial settlement demand that plaintiff's presentation of any reduced demand would have been "a vain act" and that the defendants had thereby "effectively terminated all chance for good faith negotiation." The court concluded that the defendants had "not rationally evaluate[d] the essential risks of a plaintiff's verdict, and had failed to respond in good faith" to a good faith offer from the plaintiff. A trial

court does not abuse its discretion in awarding prejudgment interest when, as here, a defendant "just says no" despite a plaintiff's presentation of credible medical evidence that the defendant physician fell short of the standard of professional care required of him, when it is clear that the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct. We find the trial court's determinations on this issue wholly in accord with the purposes of R.C. 1343.03 and with the standards set forth in *Kalain* and *Moskovitz, supra.*

III

Alleged Evidentiary Error

The defendants argue that a defense expert's testimony should not be deemed inadmissible merely because it is expressed in terms of possibilities. In the case at bar, the trial court sustained an objection to the testimony of defense expert Dr. Donald Fry that "there are a host of blood vessels that could be responsible" for a leak of blood into plaintiff's stomach, advising the witness that "possibilities are not admissible." The defendants further argue that the trial court improperly precluded Dr. Fry from testifying that the plaintiff's bile duct injury was more likely to occur during gastrectomy surgery. Defendants suggest that this evidence tended to prove that plaintiff's bile duct leak may have been a result of surgery performed by Dr. Eckhauser after plaintiff was transferred to Cleveland Metro, and not as a result of the actions of defendants or of the automobile accident.

The primary rule governing admissibility of expert testimony provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Evid.R. 702. An analysis of an expert's testimony in terms of whether it expresses a degree of certainty in excess of fifty percent may not in every case be conclusive of the admissibility of the expert's opinion. Accord *Stinson v. England* (1994), 69 Ohio St.3d 451, 633 N.E.2d 532 (no error in allowing defense expert to testify, in effect, that the event she believed had caused plaintiff's injuries was more likely than the cause propounded by plaintiff). Similarly, the Rules of Evidence authorize exclusion of evidence, including expert testimony, when the court finds in a sound exercise of discretion that the probative value of the opinion is outweighed by the danger of undue prejudice or confusion of the issues (Evid.R. 403) or that the opinion is inadmissible pursuant to some other Rule of Evidence. The question whether any particular expert's testimony, standing alone, would satisfy the burden of proof required of a party is a separate and distinct issue which is decided according to criteria different from those used to determine admissibility.

Turning to the case at bar, we find that in answering the interrogatories propounded to it, this jury found that defendants failed to meet accepted standards of care based on defendant Damian's failure to timely order a cholangiogram and to transfer plaintiff to a hospital more capable of handling his injuries. The jury did not find

professional negligence on the part of Dr. Damian in causing the bile duct leak. The court's refusal[5] to allow Dr. Fry to testify more extensively concerning other possible causes of that leak would not have affected the jury's ultimate findings of negligence. We find on this record that error in limiting Dr. Fry's expert testimony, if any, can only be considered harmless.

Based on all of the foregoing, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, J.J., concur.

MOYER, C.J., and WRIGHT, J., dissent.

APPENDIX

R.C. 2323.57 provides as follows:

"(A) As used in this section:

"(1) 'Economic loss' means any of the following types of pecuniary harm:

"(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

"(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services,

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[5] In fact, the record shows that a great deal of "other cause" testimony by Dr. Fry was eventually allowed by the trial court.

products, or accommodations as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim;

"(c) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, other than attorney's fees incurred in connection with that action.

"(2) 'Future damages' means damages that result from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that will accrue after the verdict or determination of liability by the trier of fact is rendered in that action.

"(3) 'Medical claim,' 'dental claim,' 'optometric claim,' and 'chiropractic claim' have the same meanings as in division (D) of section 2305.11 of the Revised Code.

"(4) 'Noneconomic loss' means nonpecuniary harm that results from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

"(5) 'Past damages' means damages that result from an injury, death, or loss to person or property that is a

subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that have accrued by the time that the verdict or determination of liability by the trier of fact is rendered in that action.

"(6) 'Trier of fact' means the jury or, in a nonjury action, the court.

"(B)(1) In any civil action upon a medical, dental, optometric, or chiropractic claim that is tried to a jury and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, upon motion of that plaintiff or the defendant in question, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to interrogatories that shall specify all of the following:

"(a) The past damages recoverable by that plaintiff;

"(b) The future damages recoverable by that plaintiff, and the portions of those future damages that represent each of the following:

"(i) Noneconomic loss;

"(ii) Economic loss;

"(iii) Economic loss as described in division (A)(1)(a) of this section;

"(iv) Economic loss as described in division (A)(1)(b) of this section;

"(v) Economic loss as described in division (A)(1)(c) of this section.

"(2) In any civil action upon a medical, dental, optometric, or chiropractic claim that is tried to a court and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, upon motion of that plaintiff or the defendant in question, the court shall make its determination in the action and, if that determination is in favor of that plaintiff, make findings of fact that shall specify damages as provided in division (B)(1) of this section.

"(C) If answers to interrogatories are returned or findings of fact are made pursuant to division (B) of this section and if the total of the future damages described in division (b)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment in accordance with Civil Rule 58, the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. If such a motion is timely filed, the court shall include in the journal entry an order that includes all of the following:

"(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum on a pro rata basis from among the amounts of damages awarded that represent the following four types of loss:

"(a) Noneconomic loss as specified pursuant to division (B)(1)(b)(i) of this section;

"(b) Economic loss as specified pursuant to division (B)(1)(b)(iii) of this section;

"(c) Economic loss as specified pursuant to division (B)(1)(b)(iv) of this section;

"(d) Economic loss as specified pursuant to division (B)(1)(b)(v) of this section.

"(2) A requirement that the future damages in excess of the two hundred thousand dollars paid in a lump sum pursuant to division (C)(1) of this section be used to fund a series of periodic payments over a period of time in accordance with divisions (D), (E), and (F) of this section.

"(D)(1)(a) If any party to a civil action upon a medical, dental, optometric, or chiropractic claim files a motion pursuant to division (C) of this section requesting that the future damages in excess of two hundred thousand dollars to be received by a plaintiff in the action be paid in a series of periodic payments, that plaintiff, within twenty days after the motion is filed, shall submit a periodic payments plan to the court. The plan may include, but is not limited to, a provision for a trust or an annuity, and may be proposed by that plaintiff alone or by that plaintiff and the defendant in question.

"(b) If that defendant and that plaintiff do not jointly submit a periodic payments plan, then, within twenty days after the motion requesting the payment of future damages in a series of periodic payments is filed pursuant to division (C) of this section, that defendant may submit to the court a periodic payments plan. If the

defendant does so, the plan may include, but is not limited to, a provision for a trust or an annuity.

"(c) If that defendant and that plaintiff do not jointly submit a periodic payments plan and if that defendant does not separately submit a periodic payments plan pursuant to division (D)(1)(b) of this section, then, within ten days after that plaintiff submits a periodic payments plan, that defendant may submit to the court written comments relative to the periodic payments plan of that plaintiff. If that defendant and that plaintiff do not jointly submit a periodic payments plan and if that defendant separately submits a periodic payments plan pursuant to division (D)(1)(b) of this section, then, within ten days after than defendant submits the plan, that plaintiff may submit to the court written comments relative to the period payments plan of that defendant.

"(d) The court may modify, approve, or reject any submitted periodic payments plan.

"(e) After a period payments plan is approved, the future damages that are to be received in periodic payments shall be paid in accordance with the plan, including, if applicable, payment over to a trust or annuity provided for in the plan.

"(2) If a motion requesting the payment of future damages in a series of periodic payments is not filed pursuant to division (C) of this section with respect to any plaintiff in an action upon a medical, dental, optometric, or chiropractic claim, all future damages awarded to that plaintiff shall be paid in a lump sum.

"(3) The court shall specify in the entry of judgment in the civil action the terms of any approved periodic payments plan.

"(E)(1) The court shall include in any approved periodic payments plan adequate security to insure that the plaintiff in question will receive all of the periodic payments under the approved plan. If the approved periodic payments plan includes a provision for an annuity, the defendant in question shall purchase the annuity from the following types of insurance companies:

"(a) An insurance company that the A.M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

"(b)(i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119, of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division (E)(1)(b)(ii) of this section, is a stable insurance company that issues annuities that are both safe and desirable;

"(ii) In making determinations as described in division (E)(1)(b)(i) of this section, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of an insurance company, shall consider any other relevant factors, and shall be guided by the principle that the trier of fact in a tort action should be presented only with evidence as to the cost of annuities that

are both safe and desirable for the plaintiffs in such an action who are awarded damages. In making such determinations, the superintendent also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies.

"(2) No plaintiff who is the subject of an approved periodic payments plan shall receive a lump sum payment that is less than the plaintiff's cost of litigation, including, but not limited to, attorney's fees, plus two hundred thousand dollars. The total amount paid under this division and the periodic payments plan shall not exceed the amount of the judgment.

"(F) If a court orders a series of periodic payments of future damages in accordance with this section, the following rules shall govern those payments if the plaintiff in question dies prior to the receipt of all of them:

"(1) The liability for the portion of those payments that represents future economic loss as specified pursuant to division (B)(1)(b)(iv) of this section and future noneconomic loss of that plaintiff as specified pursuant to division (B)(1)(b)(i) of this section and that is not due at the time of his death shall cease at that time;

"(2) The liability for the portion of those payments not described in division (F)(1) of this section shall continue, but the payments shall be paid to the heirs of that plaintiff as scheduled in and otherwise in accordance with the approved periodic payments plan or, if the approved payments plan does not contain a relevant provision, as the court shall order.

"(G)(1) Nothing in this section precludes a plaintiff in question and a defendant in question from mutually agreeing to a settlement of the action.

"(2) Except as provided in division (C)(2) or (F) of this section, nothing in this section increases the time for filing any motion or notice of appeal or taking any other action relative to a civil action upon a medical, dental, optometric, or chiropractic claim, alters the amount of any verdict or determination of damages by the trier of fact in a civil action upon a medical, dental, optometric, or chiropractic claim, or alters the liability of any party to pay or satisfy any such verdict or determination.

"(H) This section does not apply to civil actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code or to civil actions against the state in the court of claims."

MOYER, C.J., dissenting. Once again, the majority has declared unconstitutional an Act of the General Assembly that is neither unconstitutional by any accepted standard of review nor bad public policy.

Consistent with my views in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765, and *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504 (dissenting), I would hold that the periodic payment plan for future awards provided by R.C. 2323.57 violates neither a plaintiff's right to trial by jury nor his right to due process.

In determining the constitutionality of any statute, the analysis must begin with the well-established rule that all legislative enactments enjoy a strong presumption

of constitutionality. *Sorrell, supra,* at 418-419, 633 N.E.2d at 508, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Therefore, the party challenging the statute has the burden of proving that it is unconstitutional, and if reasonable doubt exists, the doubt must be resolved in favor of the statute's validity. Moreover, it is not the function of this court to assess the wisdom or policy of a statute but, rather, to determine whether the General Assembly acted within its legislative power. *State ex rel. Bishop v. Mt. Orab Village Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 498, 40 N.Ed.2d 913, 919.

The majority misconstrues the scope of Section 5, Article I of the Ohio Constitution. I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff is entitled. Once the jury has resolved the facts and assessed the damages, however, the constitutional right is satisfied. The inviolate right to trial by jury does not mean the award of *damages* is inviolate. Surely, if the rationale used by the majority to support its judgment is extended beyond this case, judges should no longer be authorized to enter judgments notwithstanding the verdict or order remittiturs of a jury's determination of damages. While a party has a constitutional right to have a jury assess damages for injury, the party has no right to have a jury dictate the legal process by which the jury award is satisfied. It is a startling new thought that the legislative branch does not have the constitutional authority to create that legal process. It is the province of

the legislative branch to determine policy issues relating to the method by which jury awards are satisfied.

R.C. 2323.57 does nothing more than provide a remedy in the form of periodic payments of the award determined by the jury or by a court in a bench trial. R.C. 2323.57 does not infringe upon the right to a jury trial because the statute does not apply until after the jury has completed its assigned function in the judicial process. To hold otherwise runs contrary to our common law and Rules of Civil Procedure, which provide the trial court with plenary control over judgments.

The majority also finds that R.C. 2323.57 violates the due process of law provision of Section 16, Article I of the Ohio Constitution. Because no fundamental right or suspect class is involved, our standard for review of the statute should be a "rational basis" test. We have held that under this test " '[a] legislative enactment will be deemed valid on due process grounds " * * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary." ' " (Citations omitted.) *Morris*, 61 Ohio St.3d at 688-689, 576 N.E.2d at 769. Certainly, a statute designed to respond to the growing concerns regarding the continued delivery of health care to the citizens of Ohio at affordable costs survives such minimal scrutiny. R.C. 2323.57 is simply an economic regulation and is entitled to wide judicial deference.

Because no fundamental right of the plaintiff has been violated and periodic payment of future damages provided by R.C. 2323.57 is a rational exercise of the

General Assembly's authority, I dissent from the majority's decision.

WRIGHT, J., concurs in the foregoing dissenting opinion.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 63151

CHARLES GALAYDA Plaintiff-Appellee -vs- LAKE HOSPITAL SYSTEM, INC., ET AL. [Appeal by Armando B. Damian, M.D. and Damian Clinic, Inc.] Defendants-Appellants	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 30, 1993
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-168629
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	_____

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44114-1192

HARPER, J.:

Plaintiff-appellee, Charles Galayda, filed this medical malpractice action in the Court of Common Pleas of Cuyahoga County on April 27, 1989. Armando B. Damian, M.D., Damian Clinic, Inc., Lake Hospital Systems, Inc., John Paul, M.D., John Ferron, M.D., Mohammad Rezaee, M.D., Efren Glorioso, M.D., and Lake Emergency Services, Inc., were named as defendants. Mostafa Rezai, M.D., was later added as a new party defendant. Galayda alleged that negligent care rendered to him by the defendants after a motor vehicle accident proximately caused severe injuries to his person.

Dr. Ferron was voluntarily dismissed without prejudice prior to trial on April 2, 1990. This voluntary dismissal was amended to be with prejudice by a *nunc pro tunc* journal entry on June 15, 1993. The trial court granted summary judgment in favor of Dr. Rezaee on April 5, 1990. Jury trial on the malpractice action thus commenced against the remaining defendants on July 15, 1991. During trial, Galayda dismissed Dr. Paul and the trial court directed a verdict in favor of Lake Hospital Systems, Inc.

The trial which lasted for two weeks resulted in Dr. Glorioso, Lake Emergency Services, Inc. and Dr. Rezai receiving unanimous jury verdicts in their favor. An unanimous verdict was rendered against Dr. Damian and the Damian Clinic, Inc. (collectively "appellants") in the amount of $2,781,710.

The jury awarded Galayda $800,000 in present damages and $1,981,710 in future damages. The future damages consisted of $1,396,125 for pain, suffering,

disfigurement, mental anguish, humiliation, disability and/or loss pleasure of life, and $585,585 for lost wages, salaries and benefits.

Galayda thereafter filed a Motion for Prejudgment Interest. Appellants filed a Motion for Periodic Payment of Future Damages under R.C. 2323.57 and a Motion for Set-Off of Social Security and pension plan benefits. Appellants also filed a Motion for New Trial or In the Alternative, Motion for Remittitur. The trial court, on December 31, 1991, denied all of appellants' motions and granted Galayda's motion for prejudgment interest.

I.

Galayda was involved in a motor vehicle accident on June 18, 1988 when he lost control of his car and hit a tree. He was transported to Lake County Memorial Hospital, East ("Lake Hospital") in Painesville, Ohio via ambulance where he arrived at 3:30 a.m.

Dr. Glorioso, an emergency room physician at Lake Hospital, examined Galayda upon his arrival. The examination revealed that Galayda sustained a blunt traumatic injury to his chest and abdomen; exhibited low blood pressure, an erratic pulse and rapid breathing; and suffered severe chest and abdominal pain.

Dr. Glorioso telephoned Galayda's personal physician after the initial examination and was instructed to contact the surgeon who was on call at Lake Hospital. Dr. Glorioso did so by calling Dr. Damian, a board certified surgeon, after ordering blood tests and x-rays. According to Dr. Glorioso, he probably informed Dr. Damian that he

needed to come to the hospital right away because of the severity of Galayda's injuries, including possible internal bleeding. The call occurred at approximately 4:10 a.m. A second telephone call was placed to Dr. Damian when he had yet to arrive at Lake Hospital by 5:20 a.m. Throughout the nearly one and one-half hours between the first and second telephone calls, Galayda's condition did not deteriorate although his vital signs were not normal.

Dr. Damian arrived at the hospital at about 5:40 a.m. A peritoneal lavage[1] was performed on Galayda at 5:50 a.m. Since bloody fluid was withdrawn from his abdomen, Dr. Damian immediately scheduled him for exploratory surgery.

Galayda experienced a cardiopulmonary arrest just before surgery but was resuscitated. It was necessary to perform, however, an emergency tracheostomy.[2]

Surgery eventually was underway at 6:45 a.m. Dr. Damian discovered 2,000 ccs or approximately two liters of blood within the abdominal cavity. Numerous injuries to Galayda's internal organs were uncovered after the removal of the blood, including lacerations to his liver and diaphragm, contusions on the head of the pancreas, and small injuries to his small intestine and colon.

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[1] A peritoneal lavage is a needle tap of the abdomen to determine if there is any internal injury or bleeding.

[2] A tracheostomy is an insertion of a plastic tube in the windpipe to allow for the flow of oxygen.

Further, the upper part of the small intestine, the duodenum, was stained with bile.[3]

Dr. Damian repaired the diaphragm with sutures. Sutures were also used to control bleeding from the deep and multiple lacerations on the undersurface of the liver near the bile ducts. The portions of the liver rendered necrotic or dead due to lack of blood supply were then removed.

The observance of the bile staining led to the performance of a Kocher maneuver by Dr. Damian to allow for a visual inspection of the length of the common bile duct. He was searching for a leak or injury to the duct system, but suspected that bile spilling from the liver lacerations produced the bile stain. Dr. Damian reinspected the bile duct at the completion of the surgery and then placed drains in Galayda's abdomen to drain any fluids therefrom to the outside of his body.

Galayda was taken to surgery for a second time at about 2:20 p.m. The surgery was necessitated by a drop of his blood pressure along with bloody fluid draining through the drains. Dr. Damian found a tear in Galayda's spleen upon re-opening the abdomen. He, therefore, removed the spleen. The spleen was intact during the first surgery. Although bile staining remained on Galayda's duodenum, Dr. Damian found no bile leaking

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[3] The liver produces a liquid termed bile. It is a caustic substance excreted and then passed into the bowel for digestive purposes. Normally, it passes into the common bile duct from the left and right hepatic ducts of the liver. The common bile duct passes behind the upper duodenum through the head of the pancreas and empties into the duodenum.

from the common bile duct upon visual inspection. He believed the staining was the same staining observed during the first surgery even though the internal organs were washed at that time with saline solution. Drains were once again placed in Galayda's abdomen after surgery.

Bile continued to drain from the tubes. Dr. Damian noted this occurrence in his progress reports and further noted that Galayda's bilirubin level or level of bile in the bloodstream increased.

On July 6, 1988, Galayda was returned to surgery for the third time. Surgery was prompted by his increasing abdominal pain and the results of a CT scan taken on July 5, which disclosed a collection of fluid beneath the liver and bleeding from the drain. An upper gastrointestinal series further indicated that Galayda's stomach was being pushed out. Dr. Damian with Dr. Ferron assisting, uncovered what they believed to be a 7.5 to 8 cm. pancreatic pseudocyst[4] The pseudocyst was drained and then attached to the stomach wall. A collection of bile stained fluid was also found in the space below the liver.

Galayda was later life-flighted to what was then Cleveland Metropolitan General Hospital ("Metro") on July 12, 1988 when he developed an infection, a high fever, a gastrointestinal bleed and adult respiratory syndrome. Dr. Mark Eckhauser, a gastrointestinal surgeon,

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[4] A pancreatic pseudocyst is a leak of pancreatic enzyme outside of the substance of the pancreas which has a scar lining or wall around it.

and Dr. Alan Cohen, an interventional radiologist, assumed the care of Galayda at Metro.

Dr. Eckhauser performed an exploratory laparotomy on Galayda on July 13, 1988. Blood and blood clots were removed from Galayda's stomach in the amount of 5,000 ccs or 50% of the total circulating volume of blood in a normal state. Since Galayda was not in a normal state, Dr. Eckhauser explained that some of the contents removed from his stomach were present at the time he was transferred to Metro. Dr. Eckhauser testified that it appeared the blood was coming from the point where the supposed pseudocyst was sewn to the stomach wall. The bleeding was controlled with sutures and hemo-clips and a portion of the necrotic stomach was then removed. Dr. Eckhauser further noticed that Galayda's pancreas was thick and inflamed and bile staining was still present.

A second surgery was performed on Galayda at Metro on July 14, 1988. A substantial part of his right transverse colon and left colon was removed because it was necrotic with a hole in it and other parts of the colon had a poor blood supply. Galayda was nourished after the surgery with central hyperalimentation, meaning liquid nourishment was fed through tubes inserted into his chest.

Dr. Cohen subsequently performed a percutaneous (injection through the skin) cholangiogram[5] on July 20, 1988. According to Dr. Eckhauser, the test could not have

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[5] A cholangiogram is a procedure whereby dye is injected into the bile duct system to visualize through an x-ray the bile duct for leaks and injuries.

been completed during the prior surgeries at Metro because of the internal inflammation and more so because the colon condition was a more pressing problem. The test indicated a leak of bile from the common bile duct behind the duodenum and before the duct entered the pancreas.

Galayda's medical malpractice action was based *inter alia* on appellants' failure to transfer him to a level one trauma center upon his arrival at Lake Hospital and their failure to perform an intra-operative cholangiogram during his first surgery there. The procedure would have revealed the common bile duct leak. Since the procedure, however, was not performed, he suffered severe abdominal damage.

Two of Galayda's expert witnesses at trial were Marc Shapiro, M.D., and Dr. Eckhauser. Dr. Shapiro is an associate professor of surgery at St. Louis University Medical Center where he is director of both the intensive care unit and trauma service and assistant director of the emergency department. Dr. Shapiro is board certified in general surgery with special certification in critical surgical care from the American Board of Surgery. Dr. Eckhauser, Galayda's physician at Metro, where he is on the staff, is a general surgeon with a special interest in gastrointestinal surgery. He is board certified and a fellow in the American College of Surgeons.

Dr. Shapiro testified that to a reasonable degree of medical certainty Dr. Damian did not act within acceptable standards of care when he cared for Galayda in

several respects. First, Galayda should have been transferred to a level one trauma center from the Lake Hospital emergency room. Second, Dr. Damian should have responded more quickly to Dr. Glorioso's emergency call thereby arriving at the hospital sooner. Dr. Shapiro explained that with trauma patients, definitive care should occur within the "window" of sixty minutes; two and one-half hours after the injury is too long of a period of time. Third, an intra-operative cholangiogram should have been performed during the first surgery. The location of the bile staining indicated it originated from somewhere other than the liver lacerations as believed by Dr. Damian. According to Dr. Shapiro, a leak in the distal common bile duct would have been revealed and then repaired if Dr. Damain performed the cholangiogram. Fourth, a cholangiogram should have been performed during the second surgery. Finally, Dr. Damian should have investigated the source of the bile staining during the third surgery. Dr. Shapiro opined that if Galayda received appropriate treatment, the severe abdominal damage, infection and massive abdominal bleeding would have not occurred and none of the hospitalization and operations at Metro would have been necessary. He estimated that Galayda, under these circumstances, would have been hospitalized at Lake Hospital for two to three weeks with an additional home recovery period of six to eight weeks.

Dr. Eckhauser testified that in his opinion, to a reasonable degree of medical certainty, Galayda suffered from a bile duct leak throughout his entire three week stay at Lake Hospital. He further opined that the injury, which went untreated for those three weeks, was caused

by the June 18, 1988 automobile accident. Dr. Eckhauser's testimony mimicked that of Dr. Shapiro with regard to the cholangiogram, stating the procedure should have been performed during the first and second surgeries because the location of the bile staining indicated either common bile duct or duodenal injury and there was no evidence of the latter. Rather, the injury was not diagnosed because Dr. Damian did not perform the procedure. Consequently, the caustic bile spilled onto Galayda's abdominal organs directly leading to the damage of his pancreas, stomach, and small and large intestines. Dr. Eckhauser opined that if Galayda had received the appropriate treatment at Lake Hospital, he would have been released within a month and might have required outpatient physical therapy.

Dr. Eckhauser disagreed about the existence of the pancreatic pseudocyst. He testified that the area identified as a pseudocyst by Drs. Damian and Ferron was actually a collection of infected fluid that was not adequately drained by the drains.

Dr. Cohen also testified on behalf of Galayda. Dr. Cohen, as a diagnostic radiologist, is responsible for the placement of drains and catheters in the body to drain fluid collection or to drain blocked organs, and the sampling of fluids and tissues and the biopsy thereof.

Dr. Cohen performed an arteriogram upon Galayda's arrival at Metro. He thus examined arteries in the bowel, stomach and intestines to determine which arteries were bleeding and causing Galayda's loss of blood in the gastrointestinal tract. He discovered a blockage in the large artery on the bottom of the stomach, the gastro-epiploic

artery. The diagnosis enabled Dr. Eckhauser to plan surgery accordingly. Dr. Cohen offered that bile spilling into the abdominal cavity could cause blood vessels to block and clot.

Dr. Damian presented Donald Fry, M.D., a board certified general surgeon from Albuquerque, New Mexico, as his expert witness. Dr. Fry is Chairman of the Department of Surgery at the University of New Mexico.

Dr. Fry testified that the Kocher maneuver performed by Dr. Damian during Galayda's first surgery would have revealed the disruption of his common bile duct, if it was there. Moreover, Dr. Damian's decision to not perform a cholangiogram during the first surgery in order to expeditiously complete the operation was not outside the accepted standard of care. Dr. Fry found the liver lacerations to be a satisfactory explanation for the bile staining as claimed by Dr. Damian. Dr. Fry further testified that the pancreatic pseudocyst at the head of Galayda's pancreas which Dr. Damian identified, resulted from the trauma suffered by Galayda in the accident. The injury to the pancreas and the subsequent pseudocyst formations caused an inadequate blood supply to the stomach and intestines by clotting in the right gastro-epiploic artery. The organs thus died without an adequate blood supply. Dr. Fry continued his testimony by stating that the distal gastrectomy performed by Dr. Eckhauser carries the risk of common bile duct injuries. He finally opined that all of Galayda's complications stemmed from his original injury and were not the result of poor medical care and management.

Prior to the sustaining of his injuries, Galayda believed that he was in pretty good shape. He acknowledged that he took medication for high blood pressure for a couple of years and that he experienced a severe eye injury when he was a child while playing little league baseball. His vision was corrected with eyeglasses after the accident. In addition to soft ball, Galayda golfed, and bowled. Galayda further offered that he and a friend like to cook and put on clam bakes at their friends' homes. He described this activity as "I guess if you stretched your imagination you could call it a business."

Average physical activities for Galayda now consist of playing golf; minimal weight lifting; and helping with the "catering" business which produces no income.

Galayda further testified that he has two children, Beth and Andrew. His ex-wife, Cheryl, worked late on Thursday evenings so he would take care of them on that day from after school until around 8:00 p.m. and then again on every Sunday and every other weekend.

Galayda testified that he began his employment with Ohio Bell when he was eighteen years old as a splicer helper, a position which was described as being an apprentice to a cable splicer. After six months with Ohio Bell, Galayda became a member of the Communication Workers of America and was actively involved beginning in the 1970's.

Pertaining to the day of the accident itself and the following days at Lake Hospital, Galayda could not really recall what happened to him there. He remembered not being able to sit up in the emergency room and that he

was in pain, but the remainder of his stay was recounted as "very, very foggy memories."

After he was released from intensive care at Metro and placed in another room, Galayda described that the pain was excruciating; he laid around most of the time; he lost muscle tone; and "everything hurt." Between June 18, 1988 and September, 1988, he had nothing to eat or drink; he was fed through tubes placed into various parts of his body. By the time he was released from the hospital in November, he testified that he was feeling better and that he was either walking with crutches or a four-legged cane or walker. He was also changing the wound dressings by himself. According to Galayda, he and Dr. Eckhauser decided that it was best for his mental health that he return home and he was ultimately released on November 10, 1988.

Once at home, Galayda needed to be cared for by family and friends. He testified that his bedroom became a "nice little hospital" with an IV machine and a hospital bed. Ten days after his release, he was admitted back into the hospital because he developed an infection due to non-sterile procedures. After a brief stay, he returned home.

Galayda narrated a videotape which was shown to the jury. The videotape illustrated how he had to change the dressing on his abdominal wound. The procedure which in total approximated once hour needed to be completed four times a day. Galayda also had to manage his hyperaliementation bags which he was fed by for about fifteen hours in one evening.

During this period of recovery, Galayda depicted a normal day at home as sitting around the house, doing dressing changes and taking hyperal. Friends would visit him but he took many naps because he had no endurance. Moreover, he suffered from stomach cramps and muscle aches.

He was re-admitted to Metro in February due to an infection and then again in March when he developed an infection in his left eye. Treatment was unsuccessful and the infection eventually led to the removal of his left eye. Galayda now wears a false eye. The loss of his eye affected his depth perception to the point where he bumps into objects, trips over things and feels awkward in a big group of people. He was back at Metro in April for five weeks because of another infection and reconstructive surgery on his stomach and then again in July for another infection.

Galayda then visited with Ohio Bell personnel to discuss his return to work. Although he desired to return to work, Ohio Bell denied his return, commenting that he was not fit to return to any type of work. Galayda himself did not believe that he could return to Ohio Bell because of the loss of his eye and his sudden and frequent bowel movements. They occur from every three to four hours and sometimes every hour because of his inability to absorb water through his colon. He attempted to assist in contract negotiations with the union but decided his lack of concentration due to pain disallowed him from adequately representing any party.

During cross-examination, Galayda testified that he felt he could not return to Ohio Bell because he could no

longer perform the job duties as a cable splicer. He admitted, however, that he had not performed duties as a cable splicer for at least four to five years prior to his accident. Since his accident, Galayda did not seek employment even though Dr. Eckhauser never instructed him that he could not seek employment. Specifically, Dr. Eckhauser told Galayda in February, 1989 that he could go to work, *e.g.*, in a desk job, in his estimation by June 15, 1989.

A synopsis of Galayda's physical condition throughout his hospitalization and presently reveals: removal of a large portion of his large intestine; partial removal of his stomach; prolonged hyperalimentation; removal of a large amount of his small intestines; numerous and repeat operations for the removal of unhealthy tissue; insertion of catheters and feeding tubes; an infection which destroyed his left eye; loss of intestinal function to absorb and maintain nutrients; persistent diarrhea; and an abdominal wall hernia. His stomach was reconstructed to the point that he could resume eating solid foods in May, 1989. Galayda must, however, consume Zantac to reduce acid in his stomach and also between four to fifteen extra strength Tylenol tablets per day to control pain. Galayda incurred medical bills approaching $367,000 in total.

The issue of appellants' alleged negligence was then given to the jury for determination. In special interrogatories, the jury concluded that appellants failed to meet accepted standards of care in their treatment of Galayda by 1) failing to order a cholangiogram in any of his surgeries, and 2) failing to recognize the need for definitive treatment and transfer to a hospital capable of treating his injuries. The jury then concluded that the

failure to meet the accepted standards of care directly and proximately caused Galayda's injuries.

II.

Appellants timely appeal from the jury's verdict and the trial court's ruling on their post trial motions. They assert ten errors for review.[6] For the reasons set forth below, we affirm the judgment of the trial court.

III.

Appellants, for their first assignment of error, contend in a three-part argument, that the trial court erred in granting Galayda's March 5, 1991 motion *in limine* to exclude any reference to his alcohol consumption prior to his admission to Lake Hospital on June 18, 1988. Specifically, they first aver that the evidence of alcohol use was relevant in this case. Second, appellants suggest Galayda "opened the door" to the issue of alcohol use. Finally, they maintain that the admission of evidence pertaining to intoxication and alcohol use would not have been "trial by ambush."

Appellants' position is that damage to Galayda's abdominal organs, *i.e.*, the lack of blood supply thereto and their subsequent "death", was caused by pancreatic pseudocysts. In asserting that long term alcohol abuse was a cause of pancreatic pseudocysts, appellants stress that evidence of Galayda's alleged alcohol abuse directly

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[6] See appendix.

related to his subsequent medical complications. Appellants submit that Galayda was fully aware of this position prior to trial and, therefore, would not have been "ambushed" by it. They argue, therefore, the evidence was relevant and not outweighed by the danger of unfair prejudice.

Initially, it is noted that we reject appellants' allegation that Galayda "opened the door" during opening statement to the issue of his intoxication. The door was opened, according to appellants, when Galayda's counsel explained that Galayda fell asleep at the wheel and consequently hit the tree. Appellants argue that since Galayda opened the door to the cause of the accident, they had a right to introduce evidence on this issue, *i.e.*, intoxication caused the accident and the ensuing injuries.

Appellants attempt to cloud the issues before this court by focusing on intoxication as a cause of the accident. The cause of the motor vehicle accident is not an issue in this case. The standard of care afforded to Galayda for the injuries sustained in the accident and whether a violation of the standard was the proximate cause of the complications suffered by him were the sole issues before the jury and the sole issues before this court along with the trial court's rulings through trial and thereafter.

We thus point out that appellants' response to Galayda's motion *in limine* was inappropriate. They only argued that evidence of Galayda's alcohol consumption prior to the accident "gave rise to the affirmative defense of plaintiff's comparative negligence as to the cause of his injuries" without elaboration that alcohol consumption

was relevant to either standard of care or medical causation. Moreover, appellants did not mention alcohol as an issue in this case even in their trial brief as correctly noted by the court in its ruling on Galayda's motion *in limine*.

The record reveals that it was not until the morning of trial when requesting that the trial court reconsider its ruling, appellants made their "position" clear. They alleged that Galayda was a long-time alcohol user and this usage caused him to suffer from a post-accident pancreatic pseudocyst. The pancreatic pseudocyst in turn was responsible for his abdominal organ damage and not any care rendered to him by appellants.

A motion *in limine* seeks an anticipatory ruling that evidence will probably be inadmissible, so it should be excluded until the opponent demonstrates its propriety. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259; *Brentson v. Chappell* (1990), 65 Ohio App.3d 83, 87. The ability of the trial court to entertain such a motion lies in the inherent power and discretion of the trial judge to control the proceedings. *Brentson*, 87.

Pursuant to Evid.R. 402, the admission or exclusion of relevant evidence thus rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. "Relevant" evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid.R. 401; *State v. Tolliver* (1984), 16 Ohio App.3d 20. Moreover, the trial court is vested with broad discretion in determining whether relevant evidence should be excluded

due to the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403(A), (B); *State v. Harcourt* (1988), 46 Ohio App.3d 52.

The proffered testimony of Cheryl Galayda, Galayda's former wife, included a denial of any history of heavy drinking in Galayda's family. She testified that during their marriage, he had a drink "maybe a couple of times per week" and maybe two to ten drinks at a sitting. Cheryl expressly stated, however, that Galayda did not have a drinking problem.

Ed Phillips, Galayda's friend and co-worker, testified that in his opinion, Galayda was a moderate to heavy drinker. He offered that the two of them would meet once a week and have a drink or two.

Kathleen Quinn, M.D., a psychiatrist at Metro, performed a psychiatric evaluation of Galayda. The evaluation's purpose was to determine whether "there was any mental health or emotional component or aftermath of his injuries and recovery from his June 1988 automobile accident." Dr. Quinn's proffered testimony at trial included the following:

> "Q. Did you obtain any history with regard to alcohol use or booze in the years preceding this accident?
>
> "A. Yes.
>
> "Q. What did he tell you about his history with alcohol?
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> "A. * * * he described his alcohol use as variable, ranging as often as on a daily basis, ranging from none to several drinks per day.

"Q. Have you been made aware of any of the testimony from other witnesses, friends of Mr. Galayda's, about Mr. Galayda's alcohol consumption prior to this accident in the years preceding it?

"A. No.

"Q. Mr. Phillips, a friend of Mr. Galayda's, testified yesterday also in a proffer out of the presence of the jury that Mr. Galayda was a moderate to heavy drinker; did you obtain that history from Mr. Galayda?

"A. The history that he would have described, I would describe more as to a moderate to a mild drinker."

Upon cross-examination, Dr. Quinn testified that if a person does have an alcohol problem, he or she might attempt to conceal the problem. However, the fact remains that Dr. Quinn could offer no evidence that Galayda consumed more alcohol than what he related or that he was a long term alcohol user.

The evidence attempted to be introduced by appellants pertaining to alcohol consumption is not relevant to any issues in this case. The testimony proffered at trial failed to support appellants' strained connection between Galayda's alleged alcohol consumption, accorded long-term use status by appellants, and his injuries. The evidence thus has no tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence and thus was excludable under Evid.R. 401, 402.

Appellants' first assignment of error is overruled.

IV.

In their second assignment of error, appellants assert that the trial court erred in allowing Dr. Cohen, over objection, to testify as to a new opinion at trial. At Dr. Cohen's deposition appellants questioned him with regard to the placement of surgical clips during Galayda's gastrectomy at Metro. Appellants' theory was that the surgical clips were placed in the area of the common bile duct and may have led to the damage of that duct.

Appellants' expert, Dr. Fry, in a report dated March 21, 1990 commented that Galayda "did develop clear evidence of a bile leak although this occurred after the subtotal gastrectomy and becomes problematic as to when the duct injury occurred." Thus, at his deposition, Dr. Fry testified that it was impossible for him to identify within reasonable medical probability the source of the leak.

Galayda reacted to this ambiguous testimony by notifying appellants of his intention to call Dr. Cohen as a witness because Dr. Cohen performed diagnostic testing on Galayda prior to and after the gastrectomy. Appellants then deposed Dr. Cohen. Dr. Cohen testified as follows during that deposition:

> "Q. You can't tell from these films where they [the surgical clips] exactly appear?
>
> "A. From that particular set of films, no. There are ways to tell, but not from that particular set.
>
> "Q. Did you do any kind of review of any films to try to localize those clips?

"A. There would be no reason to have done that, and the time I did this – to try to do that from this study.

"Q. Have you done it since then?

"A. No."

Prior to Dr. Cohen taking the stand, appellants objected to any testimony given with relation to a different set of films than those used during the deposition. The trial court overruled this objection and Dr. Cohen proceeded to testify as follows:

" * * * And thirdly, after the prior deposition, I went looking at the CT scan from our institution again to see if I couldn't be very accurate on exactly where the surgery was, and there's some clips on that CT film which I found subsequently, which lead me to the exact location of the surgical procedure, which is at least a couple inches away from where that leak is at, the closest, and you – it is also separated by tissue that you would not go through, namely the duodenum.

"You would not. Dr. Eckhauser would have known if he had cut through the duodenum or the pancreas to get to that location."

Appellants' objection to the testimony in which they argued it was a substantive change from the deposition testimony was overruled by the court. They now request that this court find that the allowance of this testimony amounted to "trial by ambush" in violation of the rules of discovery.

Appellants chose to have Dr. Cohen read the cholangiogram films during his deposition. He did so

stating that it was impossible to tell from these particular films the placement of the surgical clips in relation to the common bile duct. Appellants were aware that three dimensional CT scans were taken of the same depiction and yet chose not to have Dr. Cohen interpret the CT scans. There was no change in his testimony or in his opinion.

We note that Dr. Cohen's trial testimony was not a substantial change from his deposition testimony. Dr. Cohen offered his opinion both at his deposition and at trial that the common bile duct leak was present when Galayda was at Lake Hospital and that it was caused by the motor vehicle accident. Dr. Cohen used a different set of films at trial to illustrate his point and buttress his opinion. Cf. *Ramage v. Central Ohio Emergency Service* (1992), 64 Ohio St.3d 97 (where plaintiff's expert allowed to interpret x-ray not interpreted during his deposition because the expert did not present a new theory of liability). He informed appellants that it was impossible to tell from the cholangiogram films what it was that appellants wanted to know; appellants could easily have had Dr. Cohen then interpret the CT scans. Maybe then they would not have been tempted to argue on appeal that they were "ambushed" by the trial testimony. We find no evidence of unfair surprise in Dr. Cohen's testimony as the information provided by his testimony was all discoverable prior to trial. See, *Savage v. Correlated Health Serv., Ltd.* (1992), 64 Ohio St.3d 42, 47.

Accordingly, appellants' second assignment of error is overruled.

V.

Galayda moved *in limine* during trial seeking to bar Dr. Fry from testifying about appellants' related defense theory that gastrectomy surgeries carry the risk of causing common bile duct injuries. He based this motion on Dr. Fry's inability to state to a probability that Dr. Eckhauser injured the common bile duct during Galayda's gastrectomy. Dr. Fry raised it as a logical explanation in his deposition and would have testified that "the site of the leak was in high probability for common bile duct injury in gastrectomy surgery."

Appellants, in their third assignment of error, aver that the trial court erred in granting Galayda's motion. They argue that although a plaintiff bears the burden of proving defendants were negligent, the defendants are not required to prove they were not negligent. The case of *Conti v. Topolosky* (June 17, 1975), Franklin App. No. 74AP-515, unreported,[7] is quoted in support of their position as follows:

> "If a malpractice plaintiff has introduced evidence to show the probability of the occurrence of an event, a malpractice defendant need not be limited to showing probability that the event did not occur; instead, the malpractice defendant may be allowed to demonstrate that such probability as shown by plaintiff is neither a certainty, nor a great probability and defendant may attempt to do this by using 'possibility' evidence to chip away and destroy the evidence set forth by plaintiff."

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[7] Appellants fail to provide a copy of this unreported opinion to this court in violation of Loc. App.R. 19.

We interpret *Conti* differently from the appellants. This quoted passage demonstrates how a defendant can react to the plaintiff's evidence as to the probability of an occurrence. The defendant can offer possibility evidence to refute the probability *as shown by plaintiff,* is not as probable as the plaintiff claims.

Here, appellants were not chipping away at Galayda's evidence that the common bile duct injury was caused by the motor vehicle accident. Appellants were attempting to present a different cause rather than trying to demonstrate that the motor vehicle accident was not the probable cause of the common bile duct injury. Hence, we find *Conti* to not be applicable to the present circumstances.

A court's ruling concerning the admissibility of expert testimony will not be disturbed on appeal absent a showing of abuse of discretion. *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153.

We find no abuse of discretion in the trial court's ruling pertaining to the grant of Galayda's motion *in limine.* In overruling appellants' third assignment of error, we note that this testimony was to a certain extent allowed into evidence despite the trial court's ruling

VI.

Appellants submit in their fourth assignment of error that the trial court erred in awarding prejudgment interest to Galayda. They argue that the award was improper because they had a good faith, objectively reasonable

belief they had no liability and/or Galayda failed to engage in good faith settlement offers.

R.C. 1343.03(C), which allows the award of prejudgment interest as based upon a judgment, provides:

> "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

The Supreme Court of Ohio, with regard to the award of prejudgment interest, has established that:

> "A party has not 'failed to make a good faith effort to settle' under R.C. 2343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

Kalain v. Smith (1986), 25 Ohio St.3d 157, syllabus.

Moreover, the decision as to whether a party has failed to make a good faith effort to settle pursuant to

R.C. 1343.03(C) is a matter left to the sound discretion of the trial court. *Id.*, 159, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. See, also, *Worrell v. Multipress, Inc.* (1989), 45 Ohio St.3d 241; *Cox v. Fisher Fazio Foods* (1984), 13 Ohio App.3d 336. The term "abuse of discretion" involves more than just an error of law or judgment. It constitutes a judgment which is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

Contrary to appellants' contention that *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, should be applied to the facts of this case, specifically the issue of good faith, the standards set forth in *Kalain* and *Huffman* are controlling. See, *e.g.*, *Ross v. Bd. of Edn. of Solon City School District* (July 2, 1992), Cuyahoga App. Nos. 62978, 63020, unreported; *Ramos v. Kuzas* (Feb. 13, 1992), Cuyahoga App. Nos. 60932, 60495, unreported.

In the present case, a review of the record fails to disclose that the trial court's grant of Galayda's motion for prejudgment interest constituted an abuse of discretion. The court held a hearing and heard competent, credible evidence to substantiate the award.

The trial court first analyzed both parties' experts' deposition and trial testimony in evaluating whether appellants had objectively and reasonably weighed the risk of potential liability. Appellants' expert, Dr. Fry, testified at deposition and at trial with regard to whether Dr. Damian should have performed an intra-operative cholangiogram on June 18, 1988. His trial testimony follows:

"Q. So, on June 18, during the course of the surgery, you would have done a cholangiogram?

"A. I said that, I think, seven times in my deposition.

" * * *

"Q. Isn't it true that a majority of the general surgeons, a clear majority of the general surgeons faced with this same circumstance would have done an intra-operative cholangiogram?

"A. I believe I said that also, yes, sir.

"Q. And so the standard of care, the clear standard of care at the time that Dr. Damian did that first surgery was to do an intra-operative cholangiogram?

"A. I think the standard of care has to be individualized to the circumstances of each patient's circumstance.

"Q. Well, I asked you about this specific circumstance in your deposition, and I am asking you now, under these specific circumstances, Dr. Frye [*sic*], the standard of care which was applicable to Dr. Damian as it was to every other general surgeon in this country would have been to do an intra-operative cholangiogram, isn't that correct?

"A. That is correct."

Dr. Fry continued with his testimony, stating that if he had not performed the cholangiogram during the first surgery at Lake Hospital, the cholangiogram would have been performed during the second surgery.

A review of the deposition of Jonathan Glauser, M.D. was also conducted by the trial court. Dr. Glauser was

asked to refer to a report dated April 5, 1990, completed after a review of Galayda's records from Lake Hospital and Metro. In that report, Dr. Glauser opined that the liver laceration, diaphragm, mesenteric, pancreatic, and the bile duct injuries all resulted from the car accident.

Therefore, not only were the appellants presented with expert opinions from Galayda's witnesses, Drs. Eckhauser, Shapiro and Cohen, that his injuries resulted from the motor vehicle accident and Dr. Damian should have performed a cholangiogram during the first surgery. Their own witnesses provided, in essence, these same opinions which contradicted appellants' theory that alcohol consumption led to pancreatic pseudocysts which in turn led to a bile duct leak and, therefore, the failure to perform a cholangiogram did not fall below acceptable standards of medical care and proximately cause ensuing complications. Based upon this evidence alone, we decline to accept appellants' proposal that they held a reasonable and objective belief they were not liable for Galayda's injuries.

The trial court then studied how appellants evaluated their potential risks. Testimony at the hearing revealed that appellants' insurance carrier presented the claim to its "Peer Review Committee" ("the committee") once only on February 21, 1990. The initial decision was to offer no settlement figure. The committee thus did not reconvene after the expert opinions were obtained by the parties. A week before trial, the carrier's board of directors met and reviewed the matter and affirmed its "no pay" stance. The trial court determined that this "no pay" stance was inconsistent with a report of the carrier which alerted the carrier's re-insurance company to "the trial

because of the potential for a plaintiff's verdict." Moreover, the trial court recognized a letter penned by Mario Ciano, personal and corporate counsel to appellants, on July 9, 1991, in which he urged appellants to take part in "meaningful" settlement negotiations and recommended a settlement figure. He further commented that by not offering any settlement figure to Galayda, Galayda had no reason to budge from his settlement offer. Appellants, however, failed to accept Ciano's advice and never offered a settlement figure to Galayda.

Appellants suggest that the trial court stopped its analysis at this point without addressing whether Galayda made a good faith effort to settle the case. We direct appellants to the trial court's journal entry with regard to his ruling on the R.C. 1343.03(C) motion. The court expressly stated, "[i]t is of course necessary for plaintiff to have made a good faith offer to settle the case" and then continued:

> " * * * Plaintiff submitted into evidence letters to defense counsel dated May 7 and May 14, 1991 in which the demand of $5,000,000.00 was reiterated and which defense counsel was urged to enter into meaningful settlement discussions. In addition, plaintiff's counsel met with Mr. Ciano to discuss the matter and no doubt urged his intervention in an effort to elicit some kind of offer. In pretrial discussions this court also discussed settlement with both sides and made no progress. It was apparent at that time that plaintiff's demand would be reduced substantially if a reasonable offer would be made but that plaintiff was unwilling to 'bid against himself.'

> "The court finds that defendants stated their position of no offer and no settlement in such unmistakably rigid terms that plaintiff's presentation of any reduced demand would have been a vain act. The subsequent verdict of almost $3,000,000.00 demonstrates that the original demand of $5,000,000.00 was not absurd. Plaintiff's obligation under *Kalain* was to make a good faith offer and to respond in good faith to an offer from the other side. Since no offer was made, plaintiff was precluded from an opportunity to respond in good faith. The court finds that when defendants closed the settlement door, they effectively terminated all chance for a good faith negotiation. Defendants decreed that a trial was the only path to resolution."

Based upon the foregoing, and *Kalain* and *Huffman*, we find no abuse of discretion in the trial court's decision to award prejudgment interest to Galayda. Appellants' fourth assignment of error is overruled.

VII.

Appellants acknowledge that R.C. 1343.03(C) does not violate the right to a jury trial. See, *Kalain; Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222. They contend, however, in their fifth assignment of error, that the constitutional statute operated unconstitutionally in this case, *State v. Wetzel* (1962), 173 Ohio St.16, by violating appellants' right to jury trial because there was a good faith defense.

We fail to recognize any constitutional violation as alleged by appellants based upon our resolution of their fourth assignment of error, and *Kalain* and *Hardiman*.

Appellants' fifth assignment of error was overruled.

VIII.

Appellants, for their sixth assignment of error, present a three-part argument in which they contend that the trial court inappropriately denied their motion for periodic payments of future damages under R.C. 2323.57. Specifically, they first find error with the trial court's ruling that the statute is discretionary. Second, they submit the court incorrectly found the statute in violation of due process as being unreasonable and arbitrary with no reasonable relationship to the legislative goal. Finally, appellants suggest that the court erred in finding the statute violated the right to jury trial guaranteed by Section 5, Article I, of the Ohio Constitution.

In our review of the nature of R.C. 2323.57, we are guided by the following:

> "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation. *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187, 190 [citations omitted], citing *Sears v. Weimer* (1944), 143 Ohio St. 312 [citations omitted], paragraph five of the syllabus. However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent. *Meeks, supra,* 62 Ohio St.2d at 190 [citations omitted]; *Henry v. Central Natl. Bank* (1968), 16 Ohio St.2d 16 [citations omitted]; *Carter v. Youngstown* (1946), 146 Ohio St. 203 [citations omitted]; *Commercial Credit Co. v. Schreyer* (1929), 120 Ohio St. 568 [citation omitted]."

Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 96.

Further, in Ohio, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106. Courts are directed to give effect to the words of a statute and not to modify an unambiguous statute by deleting words used or inserting words not used. *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4.

The statute at issue here, R.C. 2323.57, provides, in relevant part:

> "(B)(1) In any civil action upon a medical * * * claim that is tried to a jury and in which a plaintiff makes a good faith claim against the defendant in question for future damages that exceed two hundred thousand dollars, * * * the court shall instruct the jury to return, * * * , a general verdict and, if that verdict is in favor of the plaintiff, answers to interrogatories that shall specify all of the following:
>
> "(a) The past damages recoverable by that plaintiff;
>
> "(b) The future damages recoverable by that plaintiff,
>
> " * * *
>
> "(C) If answers to interrogatories are returned or findings of fact are made pursuant to division (B) of this section and if the total of the future

> damages described in division (B)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment * * * the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in the excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. *If such motion is timely filed, the court shall include in the journal entry an order that includes all of the following:*
>
> "(1) A requirement that the first two hundred thousand dollars in future damages be paid in a lump sum * * *
>
> " * * * *
>
> "(2) A requirement that the future damages in excess of the two hundred thousand dollars paid in a lump sum * * * be used to fund a series of periodic payments over a period of time * * * ." (Emphasis added.)

We find that R.C. 2323.57 is express in its terms that if a party timely files a motion pursuant to the statute, requesting that future damages in excess of $200,000 be awarded through a periodic payment plan, the trial court *shall* order such a periodic payment plan. The use of the word "shall" by the General Assembly connotes the mandatory nature of the statute. *Crawford v. Ohio Div. of Parole & Community Serv.* (1991), 57 Ohio St.3d 184, 189. "Since the wording of the 'statute in question' is clear and unambiguous, there is no room for judicial interpretation." *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 218.

Galayda refers to subsection (D)(1)(d) of the statute where it is stated, "[t]he court may modify, approve, or reject any submitted periodic payments plan," in arguing that this provision allows a court to deny a party's motion for a periodic payment plan. However, a reading of subsection (D) reveals that this portion of the statute outlines that either party may submit a periodic payment plan to the court for approval once a party files a motion under subsection (C). If submitted, the court has the discretionary ability to modify, approve or reject these submitted periodic payment plans. The court, however, does not have the discretion to deny the motion as discussed *supra;* it merely has discretion to determine the periodic payment plan.

The trial court's ruling in this case that ordering periodic payments in accordance with R.C. 2323.57 is a discretionary decision contradicts the express wording of the statute. The trial court thus erred in this ruling.

We now turn to the constitutionality of R.C. 2323.57 by first stating one of its purposes:

> "The adoption of plans for periodic payment of judgments in R.C. 2323.56 [allowing such plans in civil actions for injury to persons, excluding certain types of actions, including medical claims as defined in R.C. 2305.11(D)] and R.C. 2323.57 was designed to bring the payment of large future damage awards in tort actions in line with 'the increasingly common use of structured settlements.' Darling, *Ohio Civil Justice Reform Act,* p. 150 (1987). Enactment of these two statutes was 'intended to encourage litigants and counsel to consider structured settlements in cases involving large future damages

> and to permit courts to enter judgments which may avoid some of the uncertainties and inequities inherent in lump-sum awards.' Darling, *Ohio Civil Justice Reform Act*, p. 151 (1987)."

Bauer, *Periodic Payment of Judgments in Ohio*, Ohio Civil Practice Journal, Vol. 2, Issue 6, 158, 159.

"A legislative enactment will be deemed valid on due process grounds ' * * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.' " *Mominee v. Scherbarth* (1986). 29 Ohio St.43 270, 274, quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, paragraph five of the syllabus. See, also, *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300. "Consequently, the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective. (Citation deleted.) *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115, 119 [11 O.O.3d 290, 293, 387 N.E.2d 231, 234]." *Schwan*, 301.

In the present case, we have not been presented with any evidence that periodic payment plans either encourage utilization of structured settlements or that such plans avoid the uncertainties and inequities of lump sum awards. See, Bauer, 159. Moreover, there is no evidence that there is a rational connection between periodic payment plans and malpractice insurance rates. In *Morris v. Savoy* (1991), 61 Ohio St.3d 684, the Supreme Court of Ohio noted there was no evidence of a rational connection between a $200,000 cap on awards and malpractice insurance rates. *Morris*, 690. In essence, the periodic payment plan places a cap on payments by allowing only a

certain amount of the total damages awarded to be doled out pursuant to a time schedule. If there is no evidence of a rational connection between a cap on the total damages to be awarded and malpractice insurance rates, we fail to recognize a rational connection between a periodic cap and such rates.

In addition, just as in *Morris* and *Mominee*, " ' * * * it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice * * * ." *Morris*, 691, quoting *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported. The statute " * * * eradicates the right to a remedy by due course of law for certain injuries * * * [committed] by a certain favored group of tortfeasors." *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, 264.[8]

This favored status is further illustrated by a comparison of R.C. 2323.57 and R.C. 2323.56. R.C. 2323.56, as stated *supra*, provides for a periodic payment of future damages in tort cases other than medical claims. Pursuant to R.C. 2323.56, a trial court is required to hold a hearing and to consider six factors in determining the propriety

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[8] In *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, the court found legislation which required that an award for future damages be invested in an annuity for installment payments violated both an individual's right to jury trial and the right to due process required by the state constitution. The court further found that a cap on damages recovered in medical malpractice actions was unreasonable and arbitrary just as the Supreme Court of Ohio found in *Morris v. Savoy* (1991), 61 Ohio St.3d 684.

of a periodic payment plan. The factors address the benefits a plaintiff will receive through the payment plan. R.C. 2323.56(D)(2)(a) through (f). The trial court is thus first afforded the discretion not to order such a plan in contrast to the mandatory nature of R.C. 2323.57. Moreover, the trial court concerns itself with the benefits enured to the plaintiff when considering a R.C. 2323.56 payment plan. The tortfeasor in a medical malpractice case obtains the benefit from a R.C. 2323.57 payment plan because the plaintiff has no right to object to a plan and thereby no right to argue he will not benefit from the plan. Finally, as correctly noted by the trial court, R.C. 2323.56 provides for interest on unpaid portions of a judgment, R.C. 2323.56(E)(1)(d), whereas no such interest provision is written into R.C. 2323.57.

This court thus finds that upon a review of R.C. 2323.57, it is apparent that the periodic payment plan afforded by the statute infringes upon a medical malpractice victim's constitutional right to a remedy by due process of law. The trial court's ruling that R.C. 2323.57 is unconstitutional based upon due process grounds is, therefore, correct.

Although we are not called upon to address whether the statute violates the equal protection clause, we note with interest the following passage in *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246:

> " 'There is no statutory reason for this separate and unequal treatment. There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To

articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution. Even remaining within the area of the professions, it is notable that the special consideration given to the medical profession by these statutes [which impose caps on medical malpractice awards] is not given to lawyers or dentists or others who are subject to malpractice suits.

" 'Additionally, assuming a valid legislative purpose to enact laws relating to protection of the public health, this legislation may be counter-productive. The extending of special litigation benefits to the medical professions certainly cannot be considered as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim.

" 'Courts of course, may not invalidate legislation merely because is it perceived as unwise. Here there is a transgression of a basic constitutional principle forbidding unequal and special treatment for a class with no general beneficent reason apparent.' "

Id., 255-256, quoting *Graley v. Satayatham* (1976), 74 O.O.2d 316, 320.

With regard to the right to jury trial, such right is guaranteed by Section 5, Article I, of the Ohio Constitution. The legislature may not attempt to either limit or abolish the right to a trial by jury. See, *Gibbs v. Girard* (1913), 88 Ohio St. 43. The right to have a jury determine the amount of damages is a substantive right not to be abridged by any action. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354.

In enacting R.C. 2323.57, the legislature effectively limits a plaintiff's access to the damages awarded by the jury. The moment the jury awarded Galayda his damages, he was entitled to them albeit an appeal was filed by appellants. R.C. 2323.57 thus interferes with his right to have damages determined by the jury, and therefore, his constitutional right to a trial by jury. See, *Kansas Malpractice Victims*, 258.

For these reasons, the periodic payment of a malpractice victim's judgment, authorized by R.C. 2323.57, violates the right to trial by jury guaranteed by Section 5, Article I, of the Ohio Constitution. The trial court accurately found this statute unconstitutional, not only on due process grounds, but on an individual's right to jury trial.

Appellants' sixth assignment of error is overruled.

IX.

Appellants, for their seventh assignment of error, posit that the trial court erred in denying their motion for new trial. They argue that the $1,981,710 future damages

award resulted from the influence of passion and prejudice, misconduct of Galayda's counsel and testimony with regard to speculative damages. Appellants urge this court to reverse the future damages award and order a new trial.

Civ.R. 59(A) provides in pertinent part:

> "(A) Grounds. A new trial may be granted to all or any of the parties and all or part of the issues upon any of the following grounds:
>
> " * * *
>
> "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice."

The granting of a motion for new trial rests in the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal unless there has been an abuse of that discretion. See, *Poske v. Mergl* (1959), 169 Ohio St. 70; *Verbon v. Pennese* (1982), 7 Ohio App.3d 182. In an action for damages for personal injury, a jury's verdict should not be set aside unless the damages were awarded under the influence of passion or prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28; *Jones v. Meinking* (1987), 40 Ohio App.3d 45; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42.

The presence of passion or prejudice is not merely proven by the size of a verdict. *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App.2d 239. In *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, the court enunciated the following standard to be utilized when reviewing whether a verdict was influenced by passion or prejudice:

> "In order to determine whether excessive damages were so influenced, a reviewing court should consider, not only the amount of damages returned and the disparity between the verdict and remittitur where one has been entered, but it also becomes the duty of such court to ascertain whether the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should be awarded."

Id., 569; see, also, *Loudy v. Faries* (1985), 22 Ohio App.3d 17.

The rule in Ohio with respect to future damages is that, "a jury should be confined to such damages as are reasonably certain to follow from the injury complained of." *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, paragraph one of the syllabus.

Appellants in the present case direct this court's attention to the following evidence admitted at trial. Galayda only takes extra-strength Tylenol[9], he watches television, walks, visits friends, travels, and plays golf. Further, although he was not allowed to return to Ohio Bell, Dr. Eckhauser never told him that he could not return to work in some format. Yet, Galayda chose to not seek employment after the accident and ensuing medical

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[9] There was testimony that Galayda takes Zantac in order to control the level of acid in his stomach.

treatment. Dr. Quinn testified that Galayda currently suffered no depression and that he was well-adjusted with regard to his experience.

Finally, appellants point to that portion of the record where Dr. Eckhauser testified that, "he could be, at some point, a gastrointestinal cripple."[10] They suggest that Dr. Eckhauser's prejudicial testimony was then exacerbated when appellants' counsel picked up this comment and relayed it to the jury once again in closing argument.

We, however, must acknowledge that Galayda has undergone an enormous amount of pain and suffering having been in hospitals for a lengthy period of time and that he still suffers from the effects of the removal of his abdominal organs. We also acknowledge that appellants fail to quote that portion of Dr. Eckhauser's opinion which mentions "reasonable medical certainty" and that portion reads:

> "A. It [Galayda's digestive system] will look like this unless he develops a bowel obstruction or some other problems that would require not only dividing the scars that block the bowel, but should he ever require anymore bowel be taken out, he could be at some point a gastrointestinal cripple.
>
> "Q. Is that opinion based upon a reasonable medical certainty?
>
> "A. Yes, it is."

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[10] We note that appellants failed to object to this comment at trial.

Galayda relieves the pain he must endure by taking up to sixteen Tylenol tablets a day. He lacks abdominal muscles and suffers from intense stomach cramping and diarrhea, oftentimes spending a whole day on or near a toilet. As a result of the loss of much of his intestines, Galayda defecates within an hour of eating and urinates quickly after drinking. Moreover, he experiences exhaustion and a lack of concentration. Finally, Galayda wears a prosthesis in his left eye socket and consequently has a loss in his depth perception and peripheral vision. Overall, his economic expert estimated that the present value of his lost future earnings was between $854,685.90 and $752,607.70.

This court thus finds that the jury award of $1,981,710, consisting of $1,396,125 for future pain and suffering and $585,585 for lost future earnings, is amply supported by the record.

Appellants' seventh assignment of error is overruled.

X.

Appellants, in their eighth assignment of error, assert that the trial court erred by not reducing Galayda's judgment by the total value of his Social Security benefits and Ohio Bell disability plan payments.

Appellants first contend that the "Ohio Supreme Court has *not* conclusively determined whether Social Security benefits fall under the definition of insurance." (Emphasis *sic.*) They correctly cite the dispositive cases on this issue, *Savage*, and *Stelma v. Juguilon* (1992), 73 Ohio App.3d 377, but misread *Savage*.

In *Hodge v. Middletown Hosp. Assn.* (1991), 62 Ohio St.3d 236, the Supreme Court of Ohio held that Medicare Part A benefits do not reduce medical malpractice awards because they fall under the definition of insurance. *Id.*, syllabus. Moreover, in *Morris*, workers' compensation benefits were likewise found to be incapable of being set-off against a damage award. *Id.*, 61. The court in *Savage* compared Social Security benefits to both workers' compensation and Medicare Part A benefits "in that all such benefits constitute (within the meaning of R.C. 2305.27) ' * * * insurance proceeds or payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award, or by his employer, or both * * * .' " *Savage*, 49.

Social Security benefits are payments under an insurance contract with the employer and employee paying the premiums and do not constitute income. *Stelma*, 387-388. The court in *Stelma* agreed with the analysis set forth in *Morris* with regard to workers' compensation benefits and concluded that "social security benefits do not constitute a collateral source which must be used to reduce plaintiff's award of damages." *Id.*, 388.

Thus, both *Savage* and *Stelma*, contrary to appellants' reading of them, expressly and boldly hold that "Social Security benefits fall under the definition of 'insurance' in R.C. 2305.27, and therefore do not reduce medical malpractice damages awards." *Savage*, 49.

Appellants next submit that they were entitled to have the judgments reduced by Galayda's Ohio Bell disability payments because they do not constitute

"insurance." They presented the following argument in the brief in support of their motion for set-off:

> " * * * Plaintiff testified that he was one hundred percent (100%) vested in the Ohio Bell Disability Plan before his accident on June 18, 1988. The present value of these benefits are Two Hundred Fifty-three Thousand Ninety-Seven Dollars ($253,097.00). Plaintiff is adjudged totally disabled, and thus, entitled to disability payments through his life expectancy of age 75.3 years of age. Plaintiff would receive these disability payments *regardless* of whether he ever filed this case. Therefore, Defendants are entitled to a set-off and reduction of judgment for disability payments in the amount of Two Hundred Fifty-three Thousand Ninety-Seven Dollars ($253,097.00)." (Emphasis *sic.*)

This argument points out the futility of appellants' argument on appeal. R.C. 2305.27 is directed toward a party who recovers a double payment for injuries sustained in a tort action. Galayda had a vested interest in the disability plan and as appellants point out, he would have received the disability payments regardless of whether he sustained any injuries as a result of any care rendered to him by defendants. The disability payments do not, therefore, constitute a second recovery for the injuries and are not to be used to reduce the jury's award of damages.

Accordingly, appellants' eighth assignment of error is overruled.

XI.

In their ninth assignment of error, appellants submit that Galayda's counsel's comments during closing argument violated DR7-106(C)(4) and (6), and amounted to misconduct warranting a new trial. This court is directed to counsel's alleged inferences that Dr. Damian and defense counsel suppressed the truth; Dr. Damian lied and deceived the jury; and the defense's case was a "script". Appellants argue these comments improperly addressed the credibility of the witnesses' testimony and suggested the defense engaged in "dishonest trickery in the trial."

In *Lang v. Minch* (1990), 53 Ohio St.3d 186, the Supreme Court of Ohio held:

> "It is axiomatic that great latitude is afforded counsel in the presentation of closing argument to the jury. *State v. Champion* (1924), 109 Ohio St. 281, 289, 142 N.E. 141, 143. See, also, *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, 215 N.E.2d 568, 578. Included within the bounds of permissible argument are references to the uncontradicted nature of the evidence presented by the advocate. *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265, paragraph one of the syllabus; *State v. Champion, supra.* The assessment of whether these bounds have been exceeded is, in the first instance, a discretionary function to be performed by the trial court. *Ohio v. Western Pennsylvania Dock Co. v. Trapnell* (1913), 88 Ohio St. 516, 521, 103 N.E. 761, 763; *Legg v. Drake* (1853), 1 Ohio St. 286, 288. Such determination will not be reversed on appeal absent an abuse of discretion. See *Breuning v.*

Russell (1960), 170 Ohio St. 444, 446, 11 O.O.2d 200, 201, 166 N.E.2d 240, 242.

This court further recognized:

" 'The determination of whether alleged misconduct of counsel was sufficient to taint the verdict with passion or prejudice ordinarily lies within the sound discretion of the trial court. *Lance v. Leohr* (1983), 9 Ohio App.3d 297, 298. "Before a reviewing court will disturb the exercise of the trial court's discretion, the record must clearly demonstrate highly improper argument by counsel which tends to inflame the jury." *Id.*, at 298.' "

Jackson v. Booth Memorial Hosp. (1988), 47 Ohio App.3d 176, 180, quoting *Acceleration Life Assur. Co. v. Walsh* (June 4, 1987), Cuyahoga App. No. 52266, unreported.

Although we note that counsel's comments were improper in that they represented his personal opinions, we do not find that the comments had any tendency to inflame the jury. For this reason, we overrule appellants' ninth assignment of error.

XII.

For their tenth and final assignment of error, appellants contend that the cumulative effect of errors throughout trial and thereafter denied them a fair trial. They argue, therefore, the cumulative effect mandated a remand and new trial.

We overrule appellants' tenth assignment of error since they are not entitled to a new trial based upon cumulative error. See, *Stelma; Dawson v. Cleveland Metro.*

Gen. Hosp. (Nov. 20, 1986), Cuyahoga App. Nos. 51032, 51779, unreported, 1986 WL 13323. This court finds that the trial court committed no errors at trial as argued by appellants.

Judgment affirmed.

It is ordered that appellee recover of appellants his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

LEO M. SPELLACY, P.J., and
PORTER, J., CONCUR.

/s/ Sara J. Harper
SARA J. HARPER
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX

"ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS THE RIGHT TO PRESENT EVIDENCE AT TRIAL OF PLAINTIFF'S ALCOHOL USE BECAUSE THAT INFORMATION WAS CRUCIAL TO THE DEFENSE THAT THE PLAINTIFF'S INJURIES WERE NOT PROXIMATELY CAUSED BY ANY ALLEGED DEPARTURE FROM STANDARDS OF MEDICAL CARE ON THE PART OF THE DEFENDANTS.

"A. *The Evidence of Alcohol Use Was Relevant Testimony In This Case*

"B. *Plaintiff Opened the door To The Issue Of Alcohol Use*

"C. *Admission of Evidence Regarding Intoxication And Alcohol Use Would Not Have Been Trial By Ambush*

"ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED BY ALLOWING DR. COHEN, AN EXPERT WITNESS FOR THE PLAINTIFF, TO TESTIFY AS TO A NEW OPINION AT TRIAL

"ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY OF DR. FRY AS TO THE PROXIMATE CAUSE OF THE INJURY TO THE COMMON BILE DUCT

"ASSIGNMENT OF ERROR NUMBER FOUR

"THE TRIAL COURT ERRED BY AWARDING PREJUDGMENT INTEREST

"A. *As Defendants Had A Good Faith, Objectively Reasonable Belief That They Had No Liability, They Did Not Need To Make A Monetary Settlement Offer*

"B. *Plaintiff Failed To Make A Good Faith Effort To Settle The Case*

"ASSIGNMENT OF ERROR NUMBER FIVE

"THE AWARD OF PREJUDGMENT INTEREST IN THIS CASE SERVED AS AN UNCONSTITUTIONAL CHILL ON THE DEFENDANT'S RIGHT TO A JURY TRIAL

"ASSIGNMENT OF ERROR NUMBER SIX

"THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION UNDER R.C. 2323.57 WHICH WOULD ALLOW THE AMOUNT OF THE JUDGMENT TO BE MADE IN PERIOD PAYMENTS

"A. *R.C. 2323.57 Imposes a* ***Mandatory*** *Duty On The Trial Court To Enter A Periodic Payment Plan In Those Cases Where The Terms Of The Statute Are Applicable*

"B. *The Periodic Payment Statute Does Not Violate Plaintiff's Due Process Rights*

"C. *The Periodic Payment Statute Does Not Violate The Right To A Jury Trial Guaranteed By Article I, Section 5 Of The Ohio Constitution Or The Seventh Amendment Of The United States Constitution*

"ASSIGNMENT OF ERROR NUMBER SEVEN

"THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION OR [*sic*] NEW TRIAL AS THE JURY VERDICT WAS EXCESSIVE AND GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE

"ASSIGNMENT OF ERROR NUMBER EIGHT

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS' MOTION FOR SET-OFF OF THE SOCIAL SECURITY DISABILITY PAYMENTS AND THE OHIO BELL PENSION PLAN PAYMENT

"ASSIGNMENT OF ERROR NUMBER NINE

"MISCONDUCT ON THE PART OF PLAINTIFF'S COUNSEL DURING CLOSING ARGUMENT WARRANTS A NEW TRIAL

"ASSIGNMENT OF ERROR NUMBER TEN

"APPELLANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THEY WERE DEPRIVED OF A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF VARIOUS ERRORS COMMITTED BY THE TRIAL JUDGE PRECEDING, DURING AND AFTER THE TRIAL" (Emphasis *sic.*)

JOURNAL ENTRY

DEC. 30, 1991

CASE NO. 168629 ASSIGNED JUDGE Lawther
Charles Galayda VS Lake Hospital Systems, Inc. et al

Defendants' Motion for New Trial and Motion to Conform Verdict pursuant to R.C. 2307.43

Overruled

/s/ Robert Z. Lawther
JUDGE

JOURNAL ENTRY

DEC. 30, 1991

CASE NO. 168629 ASSIGNED JUDGE Lawther
Charles Galayda VS Lake Hospital Systems, Inc. et al

Verdict and Judgment for Plaintiff vs. Defts. Armand Damian and Damian Clinic

$ 2,781,710.00 plus costs.

Verdict and Judgment for Defendants Efren Glorioso M.D. and Lake Emergency Services, Inc., and Mostafa Rezai, M.D. at plaintiff's costs

/s/ Robert Z. Lawther
JUDGE

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff -vs- LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	CASE NO. 168629 JUDGE ROBERT M. LAWTHER JOURNAL ENTRY AND OPINION

On July 30, 1991 the jury returned a verdict in this medical malpractice case against Defendants Armand Damian, M.D., and Damian Clinic, Inc. in the sum of $2,781,710. An interrogatory disclosed past damages of $800,000, future pain and suffering in the sum of $1,396,125 and future lost wages and benefits in the sum of $585,585. All other defendants were dismissed or found not negligent by the jury.

In accordance with Ohio Revised Code 2323.57 Defendant timely filed a motion for Periodic Payment of Future Damages. Plaintiff then filed a brief in opposition to any kind of periodic payment on the grounds that the statute is unconstitutional, being unreasonable, arbitrary, and having no reasonable relationship to any goal which may have been perceived by the Legislature to benefit the public health and welfare.

Plaintiff relies heavily upon *Morris vs. Savoy*, (1991) 61 O.S.3rd 684 which was decided after the verdict was returned in this case, and which declared unconstitutional ORC 2307.43 which attempted to limit general damages in a medical claim to $200,000. Plaintiff claims

that the same reasoning applied by the Court in that case would apply to the issue of periodic payment of future damages as provided for in ORC 2323.57.

The constitutionality of a cap on medical malpractice verdicts had been in doubt ever since the statute was enacted. Numerous trial judges have found it unconstitutional, and it is surprising that the issue had not previously reached the Supreme Court.

The Court's majority found the cap to be unconstitutional on the grounds that it violates the due process clause of the Ohio Constitution, Sec. 16, Art. I, being unreasonable and arbitrary and bearing no real and substantial relationship to public health and welfare. The Court stated (Page 690):

> "The language of the Act clearly shows that it was aimed at malpractice insurance rates, which had been rising rapidly in years previous. . . . We are unable to find, either in the amici briefs or elsewhere, any evidence to butress [sic] the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates. There is evidence of the converse, however."

The Supreme Court further cited (page 691) *Nervo vs. Pritchard*, unreported, decided by the Stark County Court of Appeals in 1985:

> "It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severly [sic] injured by medical malpractice."

Plaintiff in the instant case analogizes this reasoning to the issue of periodic payments, and claims that there is

no rational connection between such payment of damages and medical malpractice insurance rates. He further claims that such a plan discriminates against those plaintiffs most severely damaged by medical negligence.

Two major issues confront the Court in this matter. (1) Does the trial court have discretion to grant or reject Defendant's request to pay future damages in excess of $200,000 over a prescribed number of years, and (2) does Sec. 2323.57 violate one or more clauses of the Ohio Constitution?

Both issues require a comparison of Sec. 2323.57 with Sec. 2323.56, a related statute providing for periodic payment of future damages in tort cases other that [sic] medical claims. The comparison is both interesting and curious, for it illustrates remarkable diversity in the apparent motivation for these two statutes, and the willingness of the Legislature to afford special treatment for one class of defendants, those charged with medical negligence.

Sec. 2323.56 gives the appearance of being helpful to plaintiffs who might find it advantageous to receive future damages in the form of periodic payments because of special circumstances. Under this statute the Court is required to hold a hearing and to consider the following six factors:

> The purposes for which future damages were awarded.
> Plaintiff's business or occupational experience.
> Plaintiff's age.
> Plaintiff's physical and mental state.

> Whether plaintiff, parent, quardian [sic] or custodian of plaintiff is able to competently manage those portions of future damages.
>
> Any other circumstances that relates to whether the injury sustained by plaintiff would be *better compensated* by the payment of future damage in a lump sum, or by a series of periodic payments. (Emphasis supplied)

The above considerations in a non-medical case permit the Court, in its discretion, to devise a plan for periodic payment that will insure future care for the plaintiff, competent management of the funds, and the exercise of common sense for plaintiff's benefit. No language in the statute requires consideration of *Defendant's* needs or desires, nor does it indicate any concern as to whether a tortfeasor can afford to pay a judgment rendered against him.

Under Sec. 2323.57, however, no such procedure is set forth with respect to verdicts rendered in cases of medical malpractice. No attempt is made to safeguard any right of plaintiff to object to periodic payments, or to demonstrate why a lump sum would be preferable. Of even greater concern is the fact that while Sec. 2323.56 provides for interest on those portions of the judgment yet unpaid, no interest on future periodic medical damages is even mentioned in Sec. 2323.57.

The obvious result of application of Sec. 2323.57 to a judgment for future damages arising out of medical malpractice would be to delay plaintiff's recovery of damages. to deprive him of the right to interest on the judgment, and to benefit greatly only the tortfeasor or his insurance carrier. Either would be permitted to pay the

judgment on the installment plan with what will no doubt be cheaper dollars in the future, all at plaintiff's expense and sorrow.

On the issue of judicial discretion, Sec. 2323.57 (D)(1)(d) states as follows:

> "The Court may modify, approve, *or reject any* submitted periodic plan."
>
> Paragraph (F) states:
>
> "*If* a court orders a series of periodic payments . . . " (Emphasis supplied)

Reading these two sections in pari materia leads this Court to conclude that the trial court does have discretion to deny a motion for periodic payment of future damages, there having been no persuasive reason given why plaintiff's recovery should be delayed. In arguing that the statute is mandatory, Defense Counsel still admitted that the court could adopt any plan, even one which calls for payment of 50% one year and 50% the next. Such interpretation of a "mandatory" statute would indicate considerable discretion on the part of the court. Defendant cites the use of the word "shall" in the statute, but it refers to what shall be included in the journal entry, *if* the Court adopts a plan.

It is also apparent that Sec. 2323.57 must fail on Constitutional grounds. In accordance with the reasoning in *Morris vs Savoy* this Court finds the statute to be unreasonable, arbitrary, and having no reasonable relationship to any good which may have been perceived by the Legislature to benefit the public health and welfare. The unconscionable and unjustified distinction drawn by the Legislature between the rights of "ordinary" plaintiffs

and those who are victimized by medical malpractice can only be perceived as special treatment for one class of tortfeasor to the detriment of those plaintiffs most severely injured by their negligence.

Although *Morris vs. Savoy* was decided on the limited issue of due process, this Court believes that the reasoning set forth in the compelling dissent by Justice Sweeney can likewise be applied to the question of periodic payments. His opinion cites the right to trial by jury, guaranteed by Sec. 5, Art. I of the Ohio Constitution, which states that such right shall be "inviolate". It is clear that any mandatory scheme for periodic payment of future damages would infringe upon the jury's function to determine damages.

During oral argument on this motion, defense council stated that the purpose of the statute was to "reduce the costs of medical care, but it is too soon to tell if that will be the result." If studies during the last sixteen years fail to show that the $200,000 cap on damages has reduced insurance costs, it is difficult to accept the argument that periodic payments will do so in the future.

Defendant also suggests that the Court should consider the fact that he had insurance coverage of only $1,200,000. Counsel stated, "How can Dr. Damian afford to pay this judgment?" Defendant's ability to pay is clearly not an issue, and he has the same remedies and alternatives available to other defendants who owe substantial judgments.

Defense Counsel also suggested that Defendant's purchase of an annuity with a portion of the judgment would permit him to pay the full amount over a period of

years. No doubt all tortfeasors would like to have the opportunity to pay judgments in that fashion for a fraction of the full amount, but it cannot seriously be argued that an "inviolate" jury verdict can be satisfied in that manner.

This Court concludes that Sec. 2323.57 fails the same constitutional tests laid down in *Morris vs. Savoy*, plus others mentioned above, and that the Court does have discretion to reject any plan for periodic payment of future damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion be denied.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent by ordinary U.S. Mail this 30 day of Dec, 91 to Peter H. Weinberger, Counsel for Plaintiff and Anthony Dapore, Counsel for Defendants at their respective offices.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff	)	CASE NO. 168629
-vs-	)	JUDGE ROBERT M. LAWTHER
LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	JOURNAL ENTRY AND OPINION

Re: Motion for Prejudgment Interest

This matter came on for oral hearing by the Court on October 21, 1991 on the Motion for Prejudgment Interest timely filed by plaintiff pursuant to R.C. 1343.03(C). Upon consideration of this motion, the briefs and exhibits filed by the parties, the evidence and arguments presented at the oral hearing, and pertinent portions of the record and pre-trial depositions, the Court finds that the motion should be granted.

Plaintiff sued numerous parties for alleged medical malpractice arising out of care and treatment he received following a serious automobile accident in 1988. Among the defendants were Lake Hospital Systems, Dr. Mostafa Rezai, Dr. Efren Glorioso, Dr. Armand Damian and the Damian Clinic, Inc. The hospital was dismissed before trial, and Drs. Rezai and Glorioso were found not negligent by the jury. A verdict was returned against Dr. Damian and his clinic in the total sum of $2,781,710.

Plaintiff had three separate surgeries performed by Dr. Damian at Lake Hospital during a period of several weeks. As his condition worsened, a decision was made

to life-flight him to Metro General Hospital where additional surgery was performed. Although plaintiff alleged numerous acts of malpractice, the thrust of his allegations against Dr. Damian were that plaintiff should have been sent to a Level 1 Trauma Center like Metro immediately after his accident, and that Dr. Damian failed to discover a leak in the common bile duct as the result of failing to perform an interoperative cholangiogram to determine such leaks at any time during any of the three surgeries he performed.

In response to interrogatories submitted to the jury at the request of defense counsel, the jury set forth the following answer with respect to ways in which Dr. Damian and his clinic failed to meet accepted standards of care:

1. "Failure to order Cholangiogram for Mr. Galayda in any of his surgeries.

2. "Failure to recognize the need for definitive treatment and transfer of Mr. Galayda, early on, to a hospital capable of handling his injuries."

Prejudgment interest may be awarded by the trial court under the guidelines contained in R.C. 2343.03(c) as follows:

> "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid. if upon motion of any party to the action, the court determines at hearing held subsequent to the verdict or

> decision in the action, that the party required to pay the money *failed to make a good faith effort to settle the case* and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." (emphasis added)

The major case interpreting this statute, always cited by defense counsel, is *Kalain vs. Smith* (1986) 25 Ohio St. 3rd 157 which set down the rule in its syllabus as follows:

> "A party has not failed to make a good faith effort to settle under R.C. 1343.03(c) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

In the opinion, on page 203, Justice Wright also states that "The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court. This court will not overturn a finding on this issue unless the trial court's actions indicate an abuse of discretion."

The language of the statute and the *Kalain* case both impose upon the trial court one of its most difficult tasks in cases which frequently have already resulted in substantial verdicts. The court is expected to look into the minds of defense counsel to determine *their* reaction to pre-trial discovery and how it may have affected their rational evaluation of risks and potential liability. And

what may be "an objective reasonable belief of no liability" to one lawyer may mean something entirely different to others. In making such a determination, the court must apply its own experience and judgment to the parameters of the entire case, and consider whatever evidence may be produced by both sides concerning pretrial discovery, negotiations and the likelihood of victory in a jury trial.

In some cases defense counsel have taken the position that *Kalain* protects them from liability for pre-judgment interest in "no pay" cases provided they assert that in their minds, liability was doubtful. It is helpful to the court to consider the facts in *Kalain* which led to the Supreme Court's conclusions. Mr. Kalain attempted to pass a truck and then to pass the defendant's car on a two lane road without sounding his horn, as required by law. Defendant Smith testified that she activated her left turn signal and began to make a left turn when struck by Kalain's auto. Although Smith had offered nothing in settlement, the Court reversed an award of pre-judgment interest. In such a fact situation, it is not difficult to understand defendant's belief that she was making a legal left hand turn, had done nothing to cause the accident, and that a jury would in all probability place full blame on Kalain. Thus the Court found that her refusal to make an offer in settlement did not demonstrate lack of good faith.

An analysis of potential liability in a medical malpractice case, however, is generally far more complicated than in other kinds of tort actions. The purpose of the statute is to encourage settlement of such cases where

reasonable minds can recognize the strengths and weaknesses of both sides, especially in view of the expert testimony which will be offered at trial. The court in this case has endeavored to analyze the situation which developed during pre-trial and discovery proceedings, bearing upon the question as to whether defense counsel's "no pay" position could be considered "failure to rationally evaluate risk and potential liability." The court has identified three major areas of concern which should have alerted Defendants to the strong possibility that Plaintiff would prevail.

Analysis of expert testimony:

Dr. Donald Fry, an outstanding surgeon and expert in bile duct problems, was Defendants's major expert. Dr. Fry was quite candid on deposition and during trial testimony concerning Dr. Damian's medical care. Like all the doctors who testified on the issue of whether Dr. Damian should have performed an interoperative cholangiogram, *Dr. Fry stated that he should have done so, that Dr. Fry would have done so, and that a majority of surgeons would have done so.* Nevertheless he sought to excuse Dr. Damian's failure to perform this standard procedure in cases of bile leakage, in whatever language he could muster, but was clearly placed in an embarrassing position when asked if this failure constituted substandard care. In the opinion of this Court, a perusal of Dr. Fry's deposition and a review of his trial testimony would lead most observers to conclude that Dr. Fry felt the care was substandard, but didn't want to so state. See page 40 of his deposition taken on Feb. 12, 1991:

Q. is it your opinion to a reasonable degree of medical certainty that his failure to do an intraoperative cholangiogram fell below the standards of care applicable general surgeons at the time?

A. It would be my contention that it would be appropriate to do operative cholangiography for this setting.

Q. Okay. So it is your opinion, then, that if he didn't do it, that his failure to do so was a violation of those standards of care?

A. Given where the staining is described and so forth, I think it's difficult to fully understand what was going through his mind. He'll have to address that better than I. But in general, if I had staining around the bile ducts with bile, it would be my practice to do the cholangiogram, and I believe that's what most people would consider to be the correct thing to do.

Defendants' second major expert was Dr. Jonathon Glauser who was called as a specialist in emergency medicine to testify in behalf of Dr. Glorioso, one of the doctors found not negligent by the jury. Dr. Glauser's testimony, however, had direct relationship to Dr. Damian's performance as well. Dr. Glauser testified at his deposition on Feb. 18, 1991 that plaintiff "would have met the criteria for recommending that he be managed at a level one trauma center when he arrived," one of the two issues that the jury was asked to evaluate by interrogatory.

Dr. Glauser also testified at his deposition (page 41) that all of plaintiff's injuries, including the bile duct

injury, were sustained in the automobile accident. This contravenes one of defendants' theories to the effect that plaintiff's bile duct injury somehow occurred during surgery at Metro Health.

Plaintiff presented Dr. Marc Shapiro as his expert, and he gave persuasive testimony on deposition and in trial to the effect that the bile duct injury occurred in the automobile accident, that Dr. Damian "missed it" through failure to do a cholangiogram during any of the three surgeries, and that plaintiff's injuries required that he be transferred to a Level I Trauma Center without delay. While we would expect plaintiff's expert to support these allegations, the Court noted that he was a particularly persuasive witness who appeared to give straightforward and convincing testimony. In comparing his testimony to that of Dr. Fry, defense counsel must have been concerned as to the reaction the jury would have to Dr. Fry.

Peer review:

Evidence at the oral hearing on this motion disclosed that Defendants' insurance carrier presented this case to its Peer Review Committee on Feb. 21, 1990, and that the committee consists of three surgeons. At this time the initial decision was made to make no offer in settlement, but it appears that the committee did not have the benefit of depositions or reports from any of the experts who would ultimately review the facts and render opinions as to standard of care. The evidence does not indicate that this information was ever made available to the committee at a later date.

Involvement of Dr. Damian's private attorney:

Prior to the hearing on this motion, Defendants produced on discovery a letter to Mr. Dapore from Attorney Mario Ciano, who had been hired to represent Dr. Damian's personal interests. Mr. Ciano is one of the most distinguished defense attorneys in Ohio and is presently Managing Partner of Reminger & Reminger, a nationally known defense firm with much experience in medical malpractice cases. Mr. Ciano was, of course, concerned about the problem of inadequate insurance coverage for his client, and his comments must be viewed in that light. However, his analysis of the case, and his advise to Mr. Dapore at the time have a direct bearing on the issue of "good faith":

Mr. Ciano urged Mr. Dapore to engage in settlement negotiations, and cited some of the following reasons:

> "The pertinent medicine involved in the case is complex the damages are catastrophic. Dr. Fry is strong on the generalities of defense but weak on the specific issues relating to the diagnosis of bile duct injury and fistula. Dr. Eckhauser (who operated at Metro) has been put on the defense and will be a most difficult witness to overcome. . . . By offering nothing we are giving them nothing to risk and commensurately greatly enhancing Dr. Damian's risk . . . Plaintiff will move from his demand – and will move substantially. However, in the negotiating posture of having no money whatsoever offered, there is no reason or incentive for him to do so."

Mr. Ciano recommended that an initial offer of $300,000 be made in an effort to determine if settlement within the policy limits might be possible. At the oral

hearing on this motion, Mr. Dapore testified that he had replied to Mr. Ciano that if $300,000 would settle the case, he would be willing to recommend it. *No such offer, or any offer was ever made, however.*

Two days following the Ciano letter, Dr. Damian's insurance carrier faxed a report to its reinsurance co. in London concerning the impending trial date, and stated:

> "we wanted to alert you of this trial because of the potential for a plaintiff's verdict."

Defendants' theory of defense:

Defendants advanced a theory to the effect that all bile leaks had been corrected by Dr. Damian, and that the injury to the common bile duct disclosed by a cholangiogram at Metro Health must have occurred during plaintiff's care and treatment at Metro. On page 4 of Defendants' brief, counsel stated that he had presented "substantial evidence" in support of that allegation. The court cannot recall nor does his notes indicate any such evidence beyond mere speculation. It is significant to note, however, that Dr. Alan Cohen, Medical Director of Radiology at Metro, gave significant testimony to the contrary. In his deposition, at page 20 he stated:

> "In reviewing the case, even from day one, when Mr. Galayda came to our institution, it was my strong opinion that Mr. Galayda had a leak from somewhere, that by looking at that chart, there had to be a bile leak involved with it, and this could well be infected, and that most likely surgery would have been needed at that time as was undertaken by Dr. Eckhauser, to fix it; that I also thought, the history I knew in a

prospective fashion from, I believe the first day I knew Mr. Galayda was about July 12th, 1988, from that point, that that was my opinion and from the records, again, not knowing exactly what they were that were available to me at that time, on July 12th, 1988, had indicated that intervention perhaps should have been performed earlier, or that the conditions pre-existed a significant amount of time. I would rather not say intervention, I am not a surgeon, but the conditions had pre-existed for a significant amount of time.

In a subsequent brief Defendants submit additional authority in opposition to prejudgment interest, citing *Villella vs. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36. This case involved a dispute over automobile repairs, and the jury returned a verdict for $250 compensatory damages, $15,000 attorney fees, and punitive damages in the sum of $150,000. The trial court then awarded prejudgment interest. The Supreme Court, in an opinion by Justice Resnick, upheld the award of punitive damages but reversed the award of prejudgment interest.

Defendants' brief quotes the opinion as holding that "it must be demonstrated that there was a dishonest purpose, conscious wrongdoing or ill-will in the nature of fraud" for prejudgment interest to be awarded. The actual opinion, however, does not contain the words "it must be demonstrated", but cites and approves the criteria set down in *Kalain vs. Smith* and in the same paragraph adds the following dicta:

"Furthermore, a lack of good faith means more than poor judgment or negligence; rather, it

> imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud."

Justice Resnick cites *Ware vs. Richey,* (1983) 14 Ohio App. 3rd 3 as the source of this language. It is interesting to note that the *Ware* case drew it from *Centennial Ins. Co. vs. Liberty Mutual Ins. Co.,* 62 Ohio St. 2d 221, which had cited *Slater vs. Motorists Mutual Ins. Co.,* (1962) 174 Ohio St. 148. These early cases long predate the prejudgment interest statute and do not deal with medical malpractice. They arose out of the issue of "bad faith" on the part of an insurance company which refuses to settle a tort case for the policy limits when it appears that a verdict substantially higher may be awarded. It does not appear that Justice Resnick meant to lay down new guidelines superceding *Kalain,* and no reference to the prejudgment interest question appears in the syllabus of the case. The syllabus deals only with the question of punitive damages, which was the major issue of the case, and which had a direct bearing on the Court's denial of prejudgment interest. Justice Resnick further stated on page 42:

> "Consequently, because punitive damages over and above the amount adequate to compensate the plaintiff were awarded, prejudgment interest *to compensate for delay in payment* was unnecessary and the award of prejudgment interest must be vacated." (emphasis supplied)

Accordingly this court concludes that the *Villella* case dealt with a particular situation involving punitive damages, and was not intended to abrogate the guidelines contained in *Kalain.*

It is, of course, necessary for plaintiff to have made a good faith offer to settle the case. Plaintiff submitted into

evidence letters to defense counsel dated May 7 and May 14, 1991 in which the demand of $5,000,000 was reiterated and in which defense counsel was urged to enter into meaningful settlement negotiations. In addition, plaintiff's counsel met with Mr. Ciano to discuss the matter and no doubt urged his intervention in an effort to elicit some kind of offer. In pre-trial discussions this court also discussed settlement with both sides and made no progress. It was apparent at that time that plaintiff's demand would be reduced substantially if a reasonable offer would be made, but that plaintiff was unwilling to "bid against himself".

The Court finds that defendants stated their position of no offer and no settlement in such unmistakably rigid terms that plaintiff's presentation of nay reduced demand would have been a vain act. The subsequent verdict of almost $3,000,000 demonstrates that the original demand of $5,000,000 was not absurd. Plaintiff's obligation under *Kalain* was to make a good faith offer and to respond in good faith to an offer from the other side. Since no offer was made, plaintiff was precluded from any opportunity to respond in good faith. The Court finds that when defendants closed the settlement door, they effectively terminated all chance for good faith negotiation. Defendants decreed that a trial was the only path to resolution.

The Court finds that defendants did not rationally evaluate the essential risks of a plaintiff's verdict, and failed to respond in good faith to an offer from plaintiff. It would be proper for a defendant to decline to make a settlement offer where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best. It is not prudent,

however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's Motion for Prejudgment Interest be granted, and that plaintiff be awarded prejudgment interest at the rate of 10% per annum from the date of the accident, June 18, 1988, until the judgment is paid, and his costs of suit.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

December 30, 1991

Certificate of Service

A copy of the foregoing Journal Entry and Opinion was hand delivered to counsel for plaintiff and defendants, in chambers, this 30 day of December, 1991.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES GALAYDA Plaintiff -vs- LAKE HOSPITAL SYSTEM, INC., et al. Defendants	)	CASE NO. 168629 JUDGE ROBERT M. LAWTHER JOURNAL ENTRY AND OPINION

Re: Motion for Set-off of collateral source

The verdict in this medical examination malpractice case included future lost wages and benefits in the sum of $585,585. Defendants Armand Damian, M.D. and Damian Clinic, Inc. filed a motion for set-off of Plaintiff's future Social Security benefits and additional benefits to be paid under a disability pension plan set up by his former employer. Defendants allege the following benefits must be set off by virtue of R.C. 2305.27:

Social Security benefits to Plaintiff	$281,472
Social Security benefits to his children	64,513
Ohio Bell Disability Plan benefits	253,097
TOTAL	$ 599,082

In support of these computations, based on present value, Defendants filed an affidavit of James M. Marietta III, C.P.A. While objecting to Defendants' motion in toto on Constitutional grounds. Plaintiff responded to the Marietta affidavit with one prepared by Dr. John F. Burke,

Jr. He states that Defendants' figures are erroneous, and that if any set-off is allowed, the proper figures are substantially lower.

The Court indicated at the oral hearing that if any set-off would be allowed, a subsequent hearing would be held in order to hear sworn testimony from both economists, subject to cross-examination. In view of the decision which follows, the Court finds it unnecessary to take additional testimony.

R.C. 2305.27 reads as follows:

> "Except as provided in section 2743.02 of the Revised Code, in any medical claim, as defined in division (D) of section 2305.11 of the Revised Code, an award of damages shall not be reduced by insurance proceeds or payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award, or by his employer, or both, or by direct payments from his employer, but shall be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income. Unless otherwise expressly provided by statute, a collateral source of indemnity shall not be subrogated to the claimant against a physician, podiatrist, or hospital."

Defendants allege that Social Security benefits and disability pension benefits do not constitute "insurance benefits" under the statute, but fall within the definition of "other collateral recovery, and loss of earned income". Defendants' brief relied heavily on a 1990 decision by the

Court of Appeals for Butler County, titled *Hodge vs. Middletown Hospital Assn.*, which held that Medicare Part A benefits are not "insurance benefits" and should be set off. Subsequent to the filing of Defendant's motion, however, the Hodge case was reversed and remanded by the Ohio Supreme Court on Dec. 18, 1991. (*Hodge vs. Middletown Hospital Assn.*, (1991) 62 Ohio St.3d 236). Although the statute had been adopted in 1975, no interpretation of its reference to insurance benefits had previously been considered by the Court. The pertinent portions of the opinion state:

> "The legislative intent behind the statute appears to be the prohibition of double recovery on medical claims for those plaintiffs whose collateral coverage was not paid for by themselves or their employers.
>
> "To fund Medicare Part A coverage, every employee and employer pays a portion of each paycheck into the Federal Hospital Insurance Trust Fund. In the broadest sense, then, Medicare Part A is insurance paid for by the employer and employee, for the benefit of the employee. . . . For these reasons, we hold that Medicare Part A benefits fall under the definition of "insurance" in R.C. 2305.27, and therefore do not reduce medical malpractice damage awards."

Although the Supreme Court is currently split 4 to 3 on the alleged unconstitutionality of R.C. 2305.27, the vote on the the insurance issue in the *Hodge* case was 7 to 0. It is the opinion of this Court that the reasoning set forth therein applies equally to the question of Social

Security benefits and disability pension benefits arising out of the case at bar.

It is common knowledge that Social Security disability benefits are paid out of a fund created by the equal contributions of employees and employers on every pay day. In order to make sure that these benefits are adequately funded, the amounts paid into the fund each year have been increasing annually, not through an increase in the rate but through increases in the amount of wages and salary subject to the deduction.

It is further not disputed that the Ohio Bell Disability pension is funded solely by Ohio Bell, although it is no doubt considered a "benefit" when wages and hours are negotiated. It thus must be considered as part of a contractural [sic] relationship between labor and management, which gives further credence to the application of the insurance language in the statute.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of Defendants for set off of Social Security and Disability Pension benefits be denied.

/s/ Robert M. Lawther
Robert M. Lawther, Judge

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and opinion has been sent by ordinary U.S. Mail this 30 day of Dec, 1991 to Peter Weinberger, Counsel for Plaintiff and Anthony Dapore, Counsel for Defendants at their respective offices.

THE SUPREME COURT OF OHIO

1995 TERM

Charles Galayda, Appellee,	:	To wit: February 15, 1995
	:	Case No. 93-2276
v.	:	RECONSIDERATION ENTRY
Lake Hospital System, Inc., et al.	:	(Cuyahoga County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. 63151)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

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No. 94-1892

In The

Supreme Court of the United States

October Term, 1994

ARMANDO DAMIAN, M.D. and DAMIAN CLINIC, INC.,

Petitioners,

vs.

CHARLES GALAYDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This civil lawsuit was filed by Respondent in 1989, pursuant to the law of the state of Ohio. Respondent alleged that Petitioners, Armando Damian, M.D. and Damian Clinic, Inc., negligently rendered medical care to him for injuries he sustained in an automobile accident on June 18, 1988. Respondent alleged that Petitioners' negligence caused him to suffer the severe and permanent destruction of his digestive tract, the loss of his left eye, and rendered him unable to work in his job as a telephone repairman.

In July of 1991, this action was tried to a jury in the Common Pleas Court for Cuyahoga County, Ohio. At the conclusion of the two week trial, the jury returned a unanimous verdict for Respondent. The jury awarded him $2,781,710 in compensatory damages, including past and future wage loss, medical expenses, and pain and suffering.

Prior to trial, Petitioner refused to engage in settlement negotiations with Respondent. Accordingly, at the close of trial, Respondent filed a motion requesting that the court order Petitioners to pay interest on the verdict from the date of his injuries through the date of the verdict. Under Ohio law, a person who tortiously injures another party is not generally obligated to compensate the injured party for interest on the judgment accruing from the date of the injury. Where the tortfeasor fails to make a good faith effort to settle the case, however, Ohio Revised Code §1343.03(C) provides that "[i]nterest on a judgment, decree or order . . . shall be computed from the date the cause of action accrued to the date on which the money is paid. . . ."

Pursuant to Revised Code § 1343.03(C), the trial court held a hearing, reviewed the evidence, and found that the Petitioners had failed to objectively and reasonably evaluate their risk of

being held liable for Respondent's injuries, and therefore had failed to make a good faith effort to settle Petitioner's claims. Accordingly, and pursuant to Ohio law, the court granted Respondent's motion for prejudgment interest.[1]

On appeal, Petitioners alleged that R.C. § 1343.03(C) violated their rights guaranteed by the Ohio Constitution. Both the Court of Appeals and the Ohio Supreme Court denied the appeal and affirmed the trial court's order granting Petitioner's motion for prejudgment interest. Petitioners now seek review by this Court, arguing, for the first time, that their federal due process rights have been violated. This argument is without legal support and does not warrant review by this Court.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

There is no dispute that Petitioners' tortious conduct caused Respondent to suffer permanent, disabling injuries, or that during the pendency of this lawsuit the Petitioners failed to engage in good faith settlement negotiations with Respondent. These factual issues have been conclusively determined by the Ohio Supreme Court. Petitioners argue that the Ohio statute which requires that they compensate Respondent for the interest which accrued on the judgment from the time of the injury through the conclusion of trial raises an issue of due process under the United States Constitution.

---

1. For some apparent "shock value," Petitioner has misstated the amount of the prejudgment interest award as equalling "$2,000,000." In fact, the prejudgment interest equals $983,886.56, upon which 10 percent per annum interest continues to run.

The Question Presented for Review by Petitioners is nothing more than an attempt to forge a federal constitutional question from an issue of state law. Moreover, Petitioners' contention was never argued to, or decided by, the Ohio Supreme Court. As such, they have waived their argument. Armando Damian and Damian Clinic Inc.'s Petition for Writ of Certiorari should be denied.

II.

PETITIONERS' DUE PROCESS ARGUMENT HAS BEEN WAIVED; IT WAS NEITHER ARGUED NOR PASSED UPON BY THE OHIO SUPREME COURT.

This Court's statutory authority to review federal issues arising in state court decisions is set forth at 28 U.S.C. § 1257. Interpreting § 1257, this Court has held that where the petitioner has failed to raise his federal claim in the state courts and the state supreme court has therefore failed to decide the issue, this Court is without jurisdiction to hear the case. *Webb v. Webb,* 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

Moreover, this Court has repeatedly explained that where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can show the contrary." *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *see also, Fuller v. Oregon,* 417 U.S. 40, 50 n. 11, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); *Chambers v. Mississippi,* 410 U.S. 284, 290 n. 3, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Webb,* 451 U.S. at 495-496.

As Petitioners concede, the Ohio Supreme Court did not decide, or indeed even address, the federal due process claim Petitioners now raise.[2] The state court's omission creates a

2. *See* Petition, page 7, footnote 2.

rebuttable presumption that Petitioners failed to properly present the issue in the lower court. In point of fact, a review of Petitioners' Briefs to the Ohio Supreme Court confirms that they failed to present a federal constitutional issue to the Ohio court. Only once in Petitioners' 38-page Brief to the Ohio Supreme Court did they make reference to the Federal Constitution. That reference was contained in a parenthetical placed within a footnote which read:

> [T]he action of the trial court in imposing prejudgment interest deprived the defendants of a bundle of several related rights guaranteed by the Ohio Constitution: . . . the right to due process of law, Section 16, Article I (a right also guaranteed by the Fourteenth Amendment to the United States Constitution).

Page 22, footnote 8 of Brief of Appellant to the Ohio Supreme Court (21a, *infra*). Petitioners did not mention the Federal Constitution in their 21-page Reply Brief to the Supreme Court (37a-58a).

Petitioners now contend that their "challenge [in the Ohio Supreme Court] had expressly rested on both the Ohio and federal Constitutions." *Id.* This assertion is without merit. They did not argue to the Ohio Supreme Court that the application of Ohio Revised Code § 1343.03(C) violated their federal due process rights. Rather, their claim was based entirely upon the rights guaranteed by the Ohio Constitution.

This Court has consistently refused to "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinal v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969); *Webb*, 451 U.S. at 499; *Tacon v.*

Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *University of California Regents v. Bakke*, 438 U.S. 265, 283, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). As this Court held in *Webb*, "at the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim." 451 U.S. at 501 (emphasis in original).

This case fails to meet these minimum requirements. The record confirms that the Ohio Supreme Court was not appraised of the nature or substance of the federal claim Petitioners now seek to assert. This Court should decline Petitioners' invitation to take judicial notice that a federal question might have been involved in the case, as this Court has consistently done in the past. *Yazoo and M.R. Co. v. Adams*, 180 U.S. 41, 21 S. Ct. 256, 45 L. Ed. 415 (1901). The Petition for Writ of Certiorari should be denied.

III.

THE DECISION OF THE OHIO SUPREME COURT INVOLVES ONLY ISSUES OF STATE LAW, AND THUS 28 U.S.C. § 1257 PROHIBITS THIS COURT FROM REVIEWING THE DECISION.

Section 1257 confers upon this Court the jurisdiction to review final judgments of state courts only where the validity of a state statute is being challenged on federal constitutional grounds. As Professor Moore has explained, however, "the right of review provided by § 1257 is not unlimited. The prerequisites for review under the section are designed to assure that the policy of achieving consistent decisions as to federal rights is fulfilled with the least possible federal intrusion into state judicial processes." 12 James W. Moore *et al.*, *Moore's Federal Practice*, ¶ 505.01 (2d ed. 1995).

The Ohio Supreme Court's decision involved only the interpretation and application of Ohio statutory law. Section 1257 does not confer upon this Court jurisdiction to review questions involving state law. "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. City of Memphis,* 87 U.S. 590, 626 (1875).

In the present case, the Ohio Supreme Court examined Petitioners' conduct and concluded that Petitioners had failed to act in "good faith" within the meaning of Ohio Revised Code §1343.03(C). That the decision of the Ohio Supreme Court, interpreting this statute, may not be scrutinized by this federal court is well embodied in our dual system of jurisprudence. This Court must accept the "construction of the laws of the state by its highest court . . ." *Nickey v. Mississippi,* 292 U.S. 393, 396 (1933). Further:

> . . . [T]he courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; ...this Court's power to review decisions of state courts is limited to their decisions on federal questions; and ... the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

Brinderhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1929).

Nevertheless, Petitioners attempt to skirt this venerable principle of Supreme Court Jurisprudence by attempting to fabricate a federal due process argument out of the Ohio Supreme Court's interpretation and application of Ohio law.

A. The Ohio Supreme Court's Interpretation Of Revised Code § 1343.03(C) Does Not Raise A Federal Issue, And Is Not SubjectTo Review By This Court.

Petitioners claim that Revised Code § 1343.03(C) deprives it of due process because the statute "punishes" defendants for exercising their right to judicial adjudication. To the contrary, the statute merely provides that a defendant that decides to take its case to a jury despite a high likelihood of an adverse judgment will be obligated to compensate the injured party for the interest incurred on the judgment from the date of the injury, while a defendant that objectively evaluates its risk and negotiates in good faith will not be so obligated. As Petitioner concedes that a statutory framework which would assess prejudgment interest against all defendants who lose at trial or who litigate a particular type of claim or who act in bad faith would contain no constitutional infirmities, Petitioners' due process claim is clearly without merit.

B. Ohio's Prejudgment Interest Statute Is Wholly Compensatory In Nature.

In their attempt to forge a federal question out of the Ohio Supreme Court's decision, Petitioners characterize the entire Ohio prejudgment interest framework as being punitive and one-sided. However, even cursory reflection upon the nature and policy supporting prejudgment interest reveals that prejudgment interest is wholly compensatory.

The Ohio prejudgment interest statute is an attempt by the

Ohio legislature to reconcile the conflict that develops between an injured party's right to full compensation and a tortfeasor's interest in having a judicial determination of its liability. When a tortfeasor injures a party, the right to compensation is immediate. Only one party, however, can "hold the money" and thus incur interest thereupon during the pendency of the litigation. Ohio law confers the right to do so upon the defendant, but only so long as he acts in good faith. Once it is determined that the defendant is liable to the plaintiff, and that the defendant has failed to negotiate in good faith during the pendency of the litigation, the defendant will then forfeit the interest he incurred upon the sum owed to the plaintiff. Ohio's statutory scheme of assessing prejudgment interest is neither punitive nor one-sided.

IV.

REVIEW UNDER 28 U.S.C. § 1257 IS LIMITED TO SUBSTANTIAL FEDERAL QUESTIONS.

In order to sustain this Court's jurisdiction under 28 U.S.C. § 1257, more than the mere form of a federal question must exist. *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.*, 252 U.S. 388, 40 S. Ct. 404, 64 L. Ed. 626 (1920). The federal question must be substantial. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022 (1952). In past cases, a federal question has been considered insubstantial if it requires no analysis or exposition, or is clearly not debatable. *Hamilton v. Regents of University of California*, 293 U.S. 245, 55 S. Ct. 197, 79 L .Ed. 343, *rehearing denied*, 293 U.S. 633 (1934).

Accordingly, the appellate jurisdiction conferred upon this Court has traditionally been restricted to cases involving important constitutional issues, or to cases where there is conflicting authority and a need for uniformity is present. No

conflicting authority exists with regard to the constitutionality of Ohio Revised Code § 1343.03(C). In point of fact, no federal court has ever held that a statutory framework such as Revised Code § 1343.03(C) violates federal due process rights.

Further, this issue hardly falls into the realm of constitutional importance traditionally addressed by this Court. The plain facts indicate that petitioners were given access to judicial adjudication, neglected to act in good faith, and were thereafter obligated to forfeit the interest they incurred between the time of their tortious conduct and of their payment for the damages caused thereby.[3]

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3. Indeed, as the payment of the prejudgment interest award has been stayed pending appeal to this Court, Petitioner's petition has also unnecessarily delayed the payment of the interest to which the respondent is legally entitled.

CONCLUSION

This issue does not deserve further debate or analysis. Petitioners have not raised a substantial constitutional issue, and have therefore failed to raise a substantial federal question as required by 28 U.S.C. § 1257.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF DEFENDANT'S BRIEF IN THE OHIO SUPREME COURT

STATEMENT OF FACTS
(including Statement of the Case)

This is an appeal in a medical malpractice action from a judgment holding the appellants (Armando B. Damian, M.D., and Damian Clinic, Inc.) liable to plaintiff, Charles Galayda, in the sum of $2,781,710, plus an award of prejudgment interest.

The action was commenced in the Court of Common Pleas for Cuyahoga County on April 27, 1989, and named as defendants the appellants together with several other physicians and medical service providers. The complaint alleged that the defendants had rendered negligent medical care to Galayda following his involvement in a near-fatal automobile accident. The action was tried to a jury over two weeks beginning on July 15, 1991. Prior to and during trial, the action was resolved favorably to several of the defendants by dismissal, summary judgment, or directed verdict.

At the conclusion of the trial, the jury returned a verdict in favor of three of the remaining defendants, and at the same time returned a verdict against appellants in the sum $2,781,710, consisting of $800,000 in present damages and $1,981,710 in future damages. The future damages included $1,396,125 for non-economic losses, and $585,585 for economic loss (Appendix, at p. 53, hereinafter "A. 53").

Following trial, the trial court granted plaintiff's motion for prejudgment interest (A. 61). The trial court denied all of defendants' post-trial motions, including a Motion for Periodic Payment of Future Damages under R.C. 2323.57, ruling that statute unconstitutional. (A. 54)

Appendix A

On appeal, the Court of Appeals for Cuyahoga County affirmed the trial court's judgment in its entirety, rejecting each of the appellants' assignments of error (A. 4). Appellants timely filed a notice of appeal to this Court from the judgment of the Court of Appeals, on the ground that the cause raises a substantial constitutional question and involves questions of great and general public interest (A. 1).

On January 19, 1994, the Court took jurisdiction. 68 Ohio St. 3d 1436. The cause is now before the Court for decision on the merits.

STATEMENT OF FACTS

Plaintiff, Charles Galayda, a 45 year old employee of Ohio Bell, was involved in an automobile accident in the early morning hours of June 18, 1988. Mr. Galayda was intoxicated, and he lost control of his vehicle and hit a tree. (Transcript, Vol. I, at 398, [hereinafter, "I, 398] IV, 1271)* Mr. Galayda's blood alcohol level was .15 when his blood was drawn at 3:45 a.m. at Lake Hospital. (IV, 1283.)

Plaintiff was examined by an emergency room physician, Efren Glorioso, M.D., at 3:30 a.m. in Lake Hospital. Dr Glorioso determined that plaintiff had pain in the chest and belly, as well as abrasions to the face and neck. (I, 427.) He ordered various blood tests and x-rays and contacted Mr. Galayda's family physician who instructed him to contact the surgeon who was on call. (IV,

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* Because none of the facts relating to the alleged malpractice are "necessary to be considered by the Court to determine the questions presented", S.Ct.R.Prac. Rule IV, Section 1, appellants did not include the trial transcript in the Record. Thus, citations are to the transcript. The testimony of Dr. Donald Fry, defendants' expert, is included in the record because it relates to Proposition of Law No. 3.

1217.) Glorioso contacted Dr. Damian, a board-certified surgeon, and spoke to him about 4:10 a.m. He informed Dr. Damian that the patient's vital signs were stable, but that he thought the patient had possible chest and abdominal internal injuries. (I, 437, IV, 1219.)

Dr. Damian arrived at the hospital about 5:40 a.m., having prepared for a long day at the hospital once he received Dr. Glorioso's call. (I, 454, IV, 1294.) He knew that Galayda's vital signs were stable and that various tests and x-rays were being taken, and, in fact, Galayda was constantly monitored until Dr. Damian's arrival. (I, 437, IV, 1219.)

Upon arriving at the hospital and evaluating the patient's condition, Dr. Damian discovered bleeding inside the abdomen and immediately scheduled Galayda for surgery. Dr. Damian did not transfer Galayda to Cleveland Metro General Hospital, a Level One Trauma Institution, because in his judgment the injuries were within the capabilities of Lake Hospital Systems and himself.

Shortly before surgery Galayda had a cardiopulmonary arrest, but was resuscitated by means of an emergency tracheostomy. (IV, 1300-03.) After his condition was stabilized, the surgery proceeded. Dr. Damian found 2,000 cc's (approximately 2 quarts) of blood within the abdominal cavity. After the blood was removed, Dr. Damian found lacerations of the liver and the diaphragm, bruising of the pancreas, and some bile staining in the area of the small intestine near the stomach, as well as other injuries. (IV, 1305-06.) Finally, the patient had an unstable chest in which several ribs were broken. (II, 540-J.)

Dr. Damian repaired the diaphragm with sutures. There were

deep lacerations, with multiple outbranchings, on the undersurface of the liver, close to where the bile ducts enter the surface of the liver. The lacerations were controlled with sutures. (IV, 1309.)

Dr. Damian then did a Kocher maneuver in which he visually examined the length of the common bile duct. (IV, 1309.) The examination did not disclose any injury to the duct. After completing the surgery Dr. Damian reinspected the bile duct and placed drains to drain fluid from the abdomen. (IVV, 1320, 1383.)

Despite the presence of bile staining, Dr. Damian did not perform an intraoperative cholangiogram (an injection of dye to map the functioning of the bile system) during the surgery. Dr. Damian testified that he did not do so because the procedure would have prolonged the surgery on a patient who was unstable throughout the operation, and because the bile staining was satisfactorily explained by the lacerations to Galayda's liver. (IV, 1321.)

Later on the day of the surgery, Dr. Damian took plaintiff back for a second surgery. At that time, he found that the arteries to the spleen were torn free from the spleen, and he removed that organ. Dr. Damian again visually examined the common bile duct and found no bile leaking from it. (IV, 1325-28.)

The following day, some bile-stained fluid began coming out of the drain tubes, a fact that Dr. Damian attributed to the lacerations of the liver which had cut into the bile ducts inside the liver. Plaintiff developed various complications during June 18 to July 1, including respiratory distress syndrome. (IV, 1328-30.) Two HIDA scans at Lake Hospital during that period did *not* show any bile outside of the bile duct. The bile drainage stopped

about July 1 and never reappeared throughout the admission at Lake Hospital. (IV, 1332.)

On July 6, Dr. Damian took Mr. Galayda back to surgery because of increasing abdominal pain and fever. In addition, a CAT scan showed formation of a pseudocyst in the pancreas, as well as multiple smaller cysts in the head of the pancreas. (IV, 1333.) Dr. Damian located the pseudocyst and also found blood and necrotic material near the tail of the pancreas, together with contusions to the body and tail of the pancreas. He drained the pseudocyst into the stomach. (IV, 1334-38.)

Mr. Galayda was transferred to Cleveland Metro on July 12 when he developed a high fever, a gastro-intestinal bleed and adult respiratory syndrome. (II, 533, V, 709.) Shortly thereafter, he was seen by Dr. Marc Eckhauser, who took Mr. Galayda to surgery on July 13 about 12 hours after an arteriogram had been performed at Metro by Dr. Cohen, a radiologist. (III, 810.) Dr. Eckhauser found a large volume of blood in the stomach, which appeared to be coming from where the pseudocyst had been connected to the stomach to drain. (III, 717.) A partial gastrectomy (removal of part of the stomach) was performed. (III, 758). At this surgery, Dr. Eckhauser also found bile staining beneath the liver. (III, 722.)

Dr. Eckhauser performed a second surgery on July 14 to remove a substantial amount of colon because it was necrotic and other parts did not have a good blood supply. (III, 724-25.)

On July 20, Dr. Cohen performed a percutaneous (injection through the skin) cholangiogram which showed a leak of bile from the common bile duct near the small intestine. (III, 728.) That same study showed a fluid collection in the liver which Dr.

Cohen attributed to a disruption of a bile duct within the liver. (IV, 980-81.)

On November 10, Mr. Galayda went home. Further surgery allowed him to eat normally. Dr. Eckhauser indicated at trial that Mr. Galaydas major problems now include abdominal pain, the required use of Zantac to reduce acid in the stomach, persistent diarrhea and a lack of muscle over the abdomen. (III, 766-70.)

Dr. Marc Shapiro, a surgeon from St. Louis, opined for plaintiffs that Dr. Damian did not act within acceptable standards of care in several respects. First, he indicated that Mr. Galayda should have been transferred sooner to a Level One Trauma Center. Second, according to Dr. Shapiro, Dr. Damian should have come to the hospital immediately after receiving the 4:10 a.m. telephone call from Dr. Glorioso. Third, he believed that an intraoperative cholangiogram should have been performed during each of Dr. Damian's three surgeries.

The second expert witness against Dr. Damian was Dr. Marc Eckhauser, Mr. Galayda's surgeon at Cleveland Metro. Dr. Eckhauser stated that he believed the leak from the common bile duct, discovered at Metro, was caused by the automobile accident and should have been discovered and corrected by Dr. Damian during his surgeries. (III, 729.) He testified that bile had spilled on Galayda's abdominal organs from the leak in the duct, and that the condition of the abdominal organs was directly attributable to the caustic effects of the bile. In Dr. Eckhauser's view, Dr. Damian should have performed intraoperative cholangiograms, which he believed would have disclosed the leak, even though Dr. Eckhauser himself did not do any cholangiograms during his own surgeries on Mr. Galayda. (III, 727, 744-45.)

Appendix A

Dr. Donald Fry, a board certified general surgeon from Albuquerque, New Mexico, testified as an expert witness on Dr. Damian's behalf. Dr. Fry is Chairman of the Department of Surgery at the University of New Mexico. (V, 1372-75; R. 92-95.) Dr. Fry testified that the injury to Mr. Galayda's common bile duct was in a location that would have been very readily visible with a Kocher maneuver. Thus, Dr. Damian would have identified the disruption to the duct, if it had been there at the time of the surgeries, even without performing a cholangiogram. (V, 1384-85; R. 104-05.) Dr. Fry further testified that it was not outside of the standard of care for Dr. Damian, in the exercise of medical judgment, to forgo an intraoperative cholangiogram because of the need to expeditiously complete the operations and because the liver lacerations were a satisfactory explanation for the bile staining. (V, 1387; R. 107.) Dr. Fry testified that common bile duct injury is a recognized risk of a distal gastrectomy, the surgery performed by Dr. Eckhauser. (V, 1410; R. 130.)

Dr. Fry further testified that the pancreative pseudocyst at the head of the pancreas identified by Dr. Damian was a result of the trauma sustained by Mr. Galayda in the automobile accident. (V, 1399; R. 119.) Dr. Fry testified that the pancreative injury and subsequent pseudocyst formations caused a clotting that impaired the supply of blood to the stomach and intestine, so that the organs did not receive blood and died. Thus, Dr. Fry testified, all of the complications suffered by Mr. Galayda flowed from his original injury in the automobile accident and were not the consequence of poor medical care and management. (V, 1412; R. 132.)

On the basis of this evidence, the jury returned a verdict for plaintiff. Defendants post-trial motions, including a motion for the court to establish a periodic payment plan, were overruled,

and judgment was entered on the verdict. On appeal by the defendants, the Court of Appeals affirmed the judgment.

ARGUMENT

PROPOSITION OF LAW NO. 1:

R.C. 2323.57, WHICH ALLOWS FOR PERIODIC PAYMENT OF A PORTION OF FUTURE DAMAGES IN CERTAIN CASES, IS CONSTITUTIONAL.

Following the verdict in this case, the defendants timely moved pursuant to R.C. 2323.57 for the approval of a periodic payment plan, since plaintiff's future damages exceeded $200,000. (R. 196.) The trial court denied the motion, holding that the statute violated the due process and jury trial guarantees of the Ohio Constitution (A-54). The Court of Appeals affirmed that holding on the same constitutional grounds.[1]

These decisions were mistaken. First, the courts below were wrong in concluding that the statute violates due process. To the contrary, the statute is a reasonable exercise of legislative power, rationally related to the legitimate objective of mitigating the inequities created by traditional lump-sum damages awards. (Proposition of Law I(A), below.)

Second, the courts below erred in holding the statute to be inconsistent with the constitutional right to a jury trial, since the provision for periodic payments regulates only the method of

1. The trial court also ruled that the statute is discretionary, not mandatory. The Court of Appeals correctly held that this ruling was mistaken (A. 34-37). The statute is by its terms plainly mandatory in those cases to which it applies.

enforcing judgments and does not affect at all the jury's constitutional and historic role in determining the amount of damages. (Proposition of Law Number 1(B), below.)

PROPOSITION OF LAW NUMBER 1(A):

STATE STATUTES ENJOY A STRONG PRESUMPTION OF CONSTITU-TIONALITY. A PARTY WHO CLAIMS THAT A STATUTE IS UNCONSTITU-TIONAL BEARS THE BURDEN OF SHOWING THAT THE STATUTE AND THE GOVERNING CONSTITUTIONAL PROVISIONS ARE CLEARLY INCOMPATIBLE. (*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph 1 of the syllabus, approved and followed.)

R.C. 2323.57 BEARS A REAL AND SUBSTANTIAL RELATION TO THE PUBLIC WELFARE, AND IS NEITHER UNREASONABLE NOR ARBITRARY. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS PROVISIONS OF THE UNITED STATES OR OHIO CONSTITUTIONS. (*Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, followed.)

The courts below held that R.C. 2323.57 is unconstitutional under the due process clause of the Ohio Constitution, Section 16, Article I, because, as those courts perceived it, the periodic payment statute lacks any rational relationship to its legislative objective. That conclusion was produced by an analysis that effectively, and mistakenly, required defendants to justify the statute, rather than requiring plaintiff to demonstrate its

unconstitutionality. Further, on its merits the holding is wrong: the statute clearly is a constitutional exercise of legislative power.

First, the courts below erred by requiring defendants to prove the constitutionality of the statute. That requirement ignores the settled rule that every statute is presumed to be constitutional, and a party claiming unconstitutionality can prevail only by showing that the statute and the governing constitutional provisions are clearly incompatible. See State ex rel. *Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

This error in allocating the burden is reflecting in the text of the appellate court's opinion. Twice in that opinion, the court referred to the lack of evidence" to support the statute's constitutionality. Journal Entry and Opinion, at 34 (A. 38). By holding the statute unconstitutional in the perceived absence of evidence of its legitimacy, rationality, and effectiveness, the courts below effectively reversed the presumption of constitutionality that attaches to every statute.

This analytical error produced the erroneous conclusion that the statute is unconstitutional. Apart from this error in the allocation of burden of proof, however, the conclusions of the courts below are substantively wrong under the settled standard for evaluating acts of the General Assembly.

Legislative enactments do not violate the due process clause if they seek to advance a legitimate governmental objective and if the chosen means are rationally related to advancing the objective. *Granzow v. Bureau of Support* (1990), 54 Ohio St.3d 35. The inquiry is not whether the legislature acted wisely or

whether the members of a reviewing court would themselves have approved the legislature's chosen objective or means. *Sedar v. Knowlton Cosntr. Co.* (1990), 49 Ohio St.3d 193. A statute must be upheld, rather, when there exists "any conceivable set of facts under which the legislative scheme could be said to rationally further a legitimate objective. *Denicola v. Providence Hospital* (1979), 57 Ohio St. 2d 115, 119.

The courts below erred because they mistakenly deemed R.C. 2323.57 as intended primarily to reduce malpractice insurance rates. With that as the perceived objective, the courts then held that, under this Court's decision in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, the periodic payment statute was an arbitrary or irrational means of attaining that end (A. 38).

Employing this crabbed analysis, the courts below utterly failed to recognize the range of purposes served by the statute. In enacting R.C. 2323.57 the legislature was undoubtedly responding in part to pervasive concerns about the widely-perceived crisis in medical malpractice litigation, and the dislocations that the perceived crisis was thought to portend. But the statute addresses far more than a narrow concern with malpractice insurance premiums.

As has long been recognized, the traditional method of enforcing tort liabilities — by entry and enforcement of lump-sum judgments — is often a deficient means of compensating injured parties for future losses.[2] Because lump-sum judgments are based on inherently uncertain projections of life expectancies

2. *See generally* Plant, *Periodic Payment of Damages for Personal Injury*, 44 La. L. Rev 1327 (1984); Henderson, *Periodic Payments of Bodily Injury Awards* (1980) 66 A.B.A.J. 734; Elligett, *The Periodic Payment of Judgments* (1979) 46 Ins Couns.J. 130 *See also Keeton & O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (1965) at 351-358; 2 (Cont'd)

and future losses, plaintiffs are inevitably over-or under-compensated in virtually all cases: the plaintiff with permanent injuries who outlives his life expectancy at trial receives less than he ought, and the plaintiff who dies sooner leaves a windfall recovery for his heirs.

Moreover, the inherently speculative nature of predictions about future economic conditions places a significant investment risk on the lump-sum recipient. Even when prudently handled, lump-sum awards for future losses are not necessarily adequate to defray actual costs over the lives of victims. Again, such an award undercompensates the victim when the trial expert's economic forecast proves to have been too conservative, and it creates a windfall if the actual return exceeds the projections on which the lump-sum award was based. Additionally, substantial evidence suggests that improvident expenditures and investments by injured parties frequently result in the dissipation of lump-sum awards before the injured party incurs the future medical expense or earnings loss that the award is intended to cover.[3]

(Cont'd)
Harper & James, The Law of Torts (1956) §25.2, at 1303-1304; Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards* 64 Iowa L.Rev. 138, 143-45 (1978).

3. See Plant, *supra*, 44 La. L. Rev. at 1327, *citing* Michigan Law Rev'n Comm'n, *Tenth Annual Report* (1975), at 129-130 (large lump-sum awards are "frequently" dissipated within a few years), J. Morgan, M. Snyder, & M. Sobel, *Lump Sum Redemption Settlements and Rehabilitation* (Univ. of Mich., 1959) (approximately 40% of lump-sum awards under worker's compensation statute were spent rather than invested for future medical needs and earnings replacement), *and* Choulos, *Structured Settlements*, Trial (Nov. 1980) at 74 (estimate that as many as 90% of lump-sum awards are dissipated by the recipients within fiveyears of receipt).

Appendix A

Commentators who have documented these problems have consistently advocated periodic payment plans as a measure that would benefit both plaintiffs and defendants. Indeed, these proposals have been so widely embraced that in 1980, and again in 1990, the National Conference of Commissioners on Uniform State Laws approved a model or uniform "Periodic Payment of Judgments Act." And more than thirty state legislatures have adopted some provision for periodic payment of at least some classes of tort judgments. Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note.

Thus, mitigating the deficiencies associated with traditional lump-sum judgments plainly is a legitimate legislative objective. Indeed, the General Assembly had not merely the power, but an affirmative duty, to adopt measures intended to improve the fairness and accuracy of compensation for those who are tortuously injured. See Section 16, Article I, Ohio Constitution (guarantee of remedy for injury).[4]

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4. The policy considerations set forth above amply justify the General Assembly's enactment of the periodic payment statute. In fact, however, the range of justifications is considerably more broad. The array of justifications that have led to the adoption of periodic payment statutes by state legislatures has been succinctly summarized by Commissioners on Uniform State Laws:

> The purposes of the Act remain the same — to compensate tort victims suffering bodily injury fully and fairly by requiring that certain awards for future economic damages be paid periodically as the losses accrue and thereby:
>
> (1) alleviate some of the problems inherent in calculating damage awards by eliminating the need to have the trier of fact discount uture damage awards to present value;

(Cont'd)

Appendix A

Similarly, periodic payment plans are indisputably a rational means of advancing the legislative objectives. As courts have repeatedly concluded in the face of constitutional challenges to periodic payment statutes, the statutes are a sensible way of matching compensation to actual losses over time, and of ensuring that money awarded by the jury to an injured plaintiff will be available when the plaintiff actually incurs the projected

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(Cont'd)

> (2) effectuate more accurate awards of damages for actual losses by paying health care costs for the actual life of the tort victim;
>
> (3) assure that payments of economic damages more nearly serve the purposes for which they are awarded;
>
> (4) reduce the burden on relatives of personal injury victims and public assistance costs created by the premature dissipation of lump-sum payments;
>
> (5) implement the income tax policies in the United States Internal Revenue Code and corresponding state and commonwealth tax laws by providing the same favorable income tax consequences to judgment creditors as are provided to claimants who enter into structured settlements; and
>
> (6) make the tort-liability insurance system more efficient so as to keep liability insurance available and affordable.

Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note.

expenses or losses in the future. *See, e.g., Smith v. Superior Court* (Ariz. App. 1991), 831 P.2d 1279; *Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763; *Florida Patients' Compensation Fund v. Von Stetina* (Fla. 1985), 474 So.2d 783; *American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670; *State ex rel. Strykowski v. Wilkie* (Wisc. 1978), 261 N.W.2d 434.[5]

Thus, the trial and appellate courts erred in concluding that R.C. 2323.57 is unconstitutional. The objectives of matching compensation to injury, and ensuring the ability of victims to

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5. Nor is the statute objectionable because it applies only to medical malpractice cases. This Court has repeatedly held that the General Assembly may legitimately address a problem "one step at a time," with partial solutions. *See*, e.g., *Granzow, supra*, 54 Ohio St.3d 35; *Sedar, supra*, 49 Ohio St.3d 193. "That the [periodic payment] provisions at issue here apply only in actions for medical malpractice is not fatal to the scheme, for '[t]he legislature need not choose between legislating against all evils of the same kind or not legislating at all. Instead it may choose to address itself to what it perceives to be the most acute need.' " *Bernier, supra*, 497 N.E.2d at 773, *quoting Chicago National League Ball Club, Inc. v. Thompson* (1985), 483 N.E.2d 1245. *See also American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670, 677, *quoting Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 489.

It is certainly rational to limit periodic payment orders to a class of tort cases in which large future damages awards are common and in which there is a high likelihood of insurance with which to fund the periodic payments. Far from being arbitrary, it is a common and eminently responsible legislative judgment to experiment with a novel legislative solution in a limited setting, and one in which it has its greatest chance of success. Similar prudence is widely evidenced in the law of other states. *See* Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), prefatory note (in the more than 30 states that have adopted periodic payment legislation, the most frequent legislative approach has been to limit the device initially to certain kinds of tort judgments, such as medical malpractice or products liability, with later legislation expanding its application to other kinds of civil recoveries).

meet actual future costs and losses, are proper legislative considerations. The promotion of structured settlements and other periodic payment schemes as a means of furthering those objectives bears a real and substantial relation to the objectives. Under no circumstance could a court conclude, under applicable standards, that the statute is unreasonable or arbitrary. It is constitutional, and the appellate court's judgment must be reversed.

PROPOSITION OF LAW NO. 1(B):

> **R.C. 2323.57 REGULATES ONLY THE WAY IN WHICH JUDGMENTS MAY BE ENFORCED AND DOES NOT INTERFERE WITH A PARTY'S RIGHT TO A JURY DETERMINATION OF DAMAGES. THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO JURY TRIAL. (*Lash v. Mann* 1943), 141 Ohio St. 577, paragraph three of the syllabus, applied and followed.)**

The periodic payment statute does not affect in any way an injured party's right to trial by jury. The appellate court's conclusion otherwise is manifestly wrong.

Undoubtedly, the determination of damages is properly a function for the jury in any case to which the right to jury trial attaches. R.C. 2323.57 does nothing, however, to remove the determination of damages from the jury; nor does it expand the judge's authority to alter that determination of damages.[6]

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6. Of course, the Civil Rules and common law provide the trial court (not the jury) with plenary control of its judgments, orders and decrees." *Schnitzler v. Lake*

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The statute merely changes the manner by which a portion of future damages can be collected. "There is no vested right in an existing remedy and a statute may alter, modify or curtail an existing remedy." *Lash v. Mann* (1943), 141 Ohio St. 577, paragraph three of the syllabus. A party does not have a vested right "in the forms of administering justice that precludes the Legislature from altering or modifying them and better adapting them to effect their ends and objects." *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 605-06.

True, the common law provided for award of both past and future damages through a lump sum judgment. But "[a] person has no property or vested interest in a rule of the common law. * * * The Constitution does not forbid the creation of new or the abolition of old common-law rights." *Phipps v. City of Dayton* (1988), 57 Ohio App. 3d 11, 14 *citing Duke Power Co. v. Carolina* Environmental Study Group, Inc. (1978), 438 U.S. 59. The determination of the damages that may be collected in a civil action is uniquely the function of the General Assembly. *Keaton v. Ribbeck* (1979), 58 Ohio St. 2d 443, 445.

Here, the legislature did not exercise even that broad power. Rather, it merely passed a law that empowers the court to order a periodic payment plan when requested by either party to do so. The court has broad discretion to fashion an appropriate plan, and is expressly authorized to "modify, approve, or reject any submitted periodic payments plan." R.C. 2323.57(D)(1)(d).

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Shore Coach Co. (Cuyahoga App. 1942), 41 N.E. 2d 436, 438, quoting Black on Judgments, Chapter IX, page 153. Thus, it is settled that the judicial power to grant a new trial on damages, or to order a conditional remittitur, does not offend the constitutional right to trial by jury. *Poske v. Mergl* (1959), 169 Ohio St. 70, 74.

Under the statute, the jury determines damages, and it determines the amount that is attributable to future losses; only the manner of collecting the portion of the award attributable to future damages in excess of $200,000 is subject to determination by the judge. Until a trial court adopts a plan under the statute, one cannot know the manner of collection. Conceivably, collection under a plan could be so attenuated or protracted, and thus bear so little relationship to the future damages determined by the jury, that it would, in effect, subvert the jury's determination. In such a case, a victim might have a constitutional challenge to the plan, but that would be, at most, to the statute *as applied.*

Here, the appellate court erroneously ruled the statute unconstitutional on its face, without any proof of how it has been applied, and without application in this case. The court's conclusion that on its face "R.C. 2323.57 * * * interferes with [plaintiff's] right to have damages determined by the jury, and therefore, his constitutional right to a trial by jury" (A. 41) is wrong.[7] Without a specific approved plan for the payment of plaintiff's future damages, no court could possibly assess whether the plan "interfered" with the jury's determination of damages.

The trial court's declaration that the statute is unconstitutional on its face was erroneous, as was its refusal to

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7. Under the statute, the jury determines both the plaintiff's entitlement to damages and the amount of damages. It was never a part of the jury's historical role to go beyond that and determine how and when the amounts should be paid, since those were matters governed by non-jury proceedings for the execution and enforcement of judgments. On its face, then, the statute cannot be said to invade the jury's province to any extent at all. *Accord: Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763, 772; *American Bank & Trust Co. v. Community Hosp.* (Cal. 1984), 683 P.2d 670, 680-681.

enter a periodic payment plan. The appellate court's judgment, affirming the trial court's declaration, was also erroneous. It must be reversed.

* * * * *

In sum, the novel rulings of the trial and appellate courts in this case are wrong, and they depart vastly from this Court's established precedents regarding the proper scope of judicial review of legislative enactments.

If permitted to stand, the decisions below would greatly, and impermissibly, expand the power of reviewing courts to overturn the considered judgments of the legislature in the exercise of its time-honored power to enact legislation in furtherance of the public good. That encroachment on legislative power is the product of the appellate court's substantive errors regarding the identification of permissible legislative objectives and the evaluation of the legislature's judgment as to how to further those objectives. The encroachment is aggravated, moreover, by the appellate court's error in treating statutes as presumptively unconstitutional, subject to invalidation unless a trial court is convinced of their constitutionality.

These holdings are incompatible with the elemental precepts of separation of powers and judicial review that are at the core of our constitutional system. In addition, the decisions below require reversal because they struck down a statute that reflects a seasoned, sensible judgment about how victims of medical malpractice can most effectively and fully be compensated for their injuries. Superficially, the rulings may appear to protect victims' rights, and that is how they were couched by the courts below. In truth, though, the rulings eliminate a carefully

considered and thoroughly supported legislative judgment that periodic payment plans protect victims by ensuring their ability to survive their losses and defray the costs caused by their injuries.

Reversal is likewise required as to the mistaken decision of the courts below that the statute violates the right to trial by jury. Periodic payment plans do not operate as a cap on damages, nor do they deprive injured persons of access to damages awarded by the jury, or in any other way interfere with the constitutional right to have a jury assess damages.

Under the statute, malpractice plaintiffs receive immediately *all* past and present damages, both economic and non-economic. They also receive the first $200,000 of future damages, because the statute applies only in cases in which such damages exceed that amount. And, as to the balance of future damages, there is nothing in the statute that prevents a court from affording the injured party the full monetary value of the jury's award. To the contrary, the statute, although mandatory in requiring entry of a payment plan, preserves the trial court's discretion to fashion an appropriate plan for future payments. The actual effect of the statute on a particular plaintiff depends on the specific plan approved by the trial court. It is not facially unconstitutional.

The lower courts' severe departure from the proper regard to be paid legislative enactments, a departure that invalidated a considered measure addressed to matters of important public concern, cannot be permitted to stand.

Appendix A

PROPOSITION OF LAW NO. 2

THE CONSTITUTION PROHIBITS THE AWARD OF PREJUDGMENT INTEREST UNDER R.C. 1343.03 AGAINST A DEFENDANT WHO EXERCISES HIS CONSTITUTIONAL RIGHT TO TRIAL BASED ON A GOOD FAITH, OBJECTIVELY REASONABLE BELIEF THAT HE IS NOT LIABLE. A PARTY'S BELIEF THAT HE IS NOT LIABLE IS OBJECTIVELY REASONABLE AS A MATTER OF LAW IF REASONABLE MINDS COULD DIFFER AS TO LIABILITY. (Kalain v. Smith [1986], 25 Ohio St. 3d 157 approved and followed.)

The award of prejudgment interest in this case deprived defendants of their constitutional right to trial by jury.[8] As a matter of law, defendants had a good faith, objectively reasonable belief that they were not liable. Their defense was supported by competent expert testimony and it was sufficient to create a jury issue as to liability.[9] By definition, then, reasonable minds could have concluded that defendants were not liable. That is precisely what defendants here concluded, and why they chose to exercise

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8. More precisely, the action of the trial court in imposing prejudgment interest deprived the defendants of a bundle of several related rights guaranteed by the Ohio Constitution: the right to trial by jury, Section 5, Article I, the right to due process of law, Section 16, Article I (a right also guaranteed by the Fourteenth Amendment to the United States Constitution), and the right of access to the courts, Section 16, Article I. *Cincinnati, H. & D. R. Co. V. Sullivan* (1877), 32 Ohio St. 152.

9. Plaintiff did not move for a directed verdict on liability. He would not have been entitled to one, nor to a judgment n.o.v. if the jury had determined that the defendants were not liable.

their constitutional right to try the question of their liability. The imposition of prejudgment interest under these circumstances impermissibly penalized defendants for their exercise of that right.

Specifically, as described in part (A), below, because the sanctions authorized by the statute are punitive and one-sided, they cannot constitutionally be imposed on a non-settling defendant who has a good faith and objectively reasonable belief that he is not liable, and therefore exercises his constitutional right to trial by jury. This Court's holding to that effect in *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, syllabus, is constitutionally compelled.

Due to this constitutional basis, as described in part (B), below, the *Kalain* holding permits the imposition of prejudgment interest only in those cases where reasonable minds could not differ as to the non-settling defendant's liability: in those cases, there is no constitutional right to trial and the statute's sanctions do not operate to punish the exercise of the right. Thus, as described in part (C), below, the imposition of sanctions in this case was unconstitutional, since as a matter of law reasonable minds could have differed over the defendants' liability, and the defendants' exercise of their constitutional right to trial could not lawfully be punished.

Finally, as described in part (D), below, quite apart from these constitutional considerations, the imposition of prejudgment interest in this case was improper because it materially departed from the standard established in *Kalain*. By imposing prejudgment interest on the ground that the plaintiff had a better than "nonexistent" or "marginal" chance of

prevailing, the courts acted on a fundamentally erroneous view of the showing required to warrant an award of prejudgment interest.

A. The Holding in *Kalain v. Smith* is constitutionally compelled.

In *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, syllabus, this Court established the standards for award of prejudgment interest under R.C. 1343.03(C). Those standards place the focus on the defendant's unnecessary attempts to delay the proceedings and on the parties' conduct in discovery and regarding settlement. Critically, this Court held in the final sentence of the syllabus that "[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.*

This sentence is constitutionally compelled. Without the limitation it supplies, the statute would unconstitutionally penalize litigants for the good faith exercise of a constitutional right. If a party chooses to try, rather than to settle, a case, that choice is constitutionally protected unless it is made in bad faith. This Court recognized this point in *Kalain* itself, construing the statute to protect the good faith exercise of the right to trial. That construction was necessary to preserve the statute's constitutionality.

A State may legitimately encourage settlement by means of various incentives. Ohio's prejudgment interest statute is among those incentives. As compared with the settlement incentives of other states, and with other prejudgment interest rules adopted in Ohio, however, this statute is unique. It is unique, first, in that it

imposes liability for pretrial settlement conduct only on defendants. It is unique, further, in that its sanction is punitive rather than compensatory — liability for prejudgment interest under the statute is calculated as a percentage of the judgment from the date of injury, without regard to the losses caused by the failure to settle. These features set R.C. 1343.03(C) apart from other statutes regarding prejudgment interest, which are compensatory in form and effect; and they set the statute apart from other statutes that impose incidental burdens on the exercise of constitutional rights because the imposition of this punitive burden, or sanction, on the exercise of the right to trial is not merely incidental but central to the statutory scheme. The statute's object, that is, is to dissuade resort to trial, not by compensating the other party or the state for the cost of exercising the right, but rather by punishing the non-settling party for having gone to trial.[10]

These unique features of the Ohio statute are problematic; each runs perilously close to rendering the statute facially unconstitutional. Those difficulties are avoided, and the statute is saved from facial unconstitutionality, only by the critical final sentence of the syllabus in *Kalain*.

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10. The punitive character of the Ohio statute is most obvious when the statute is compared to the similar statutory settlement incentives of other states. Under Ohio's scheme, interest runs from the date of the injury, without regard to when the non-settling party should have settled. Under the laws of other states, interest or similar costs begin to accrue only on or after the date that a settlement offer was unreasonably refused, a difference in timing directly related to an intent to compensate the other party for the delays caused by litigation. *See, e.g.*, Col Rev. St § 13-17-202; Conn. Gen St. Ann. § 52-192a; Fla St. Ann. § 45.061; Id. Code § 12-301; Minn. St. Ann. § 549.09; Mo. St. Ann. § 408-040; Nev. St. Ann. §17.115.

Appendix A

1. Punitive sanctions cannot punish exercise of constitutional rights.

Punitive measures of the kind imposed by the prejudgment interest statute are not inherently unconstitutional. They are permissible if directed at conduct that can lawfully be punished, such as deliberate, bad faith delay of litigation. In contrast, such measures are unconstitutional if they are imposed to punish the exercise of a constitutional right — here, the right to trial by jury, and, more broadly, the right to trial and of access to courts. *Shapiro v. Thompson* (1969), 394 U.S. 618, 631 *quoting United States v Jackson* (1968), 390 U.S. 570, 581 ("If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' "); *State ex rel. Christian v. Barry* (1931), 123 Ohio St. 458, syllabus.

2. Punitive sanctions cannot be one-sided.

The prejudgment statute is also problematic because it is one-sided; that is, only defendants bear the risk of sanction for failure to settle. A plaintiff who makes no effort to settle, and who loses no sanction under R.C. 1343.03(C). In contrast, a defendant who makes no effort to settle faces the palpable, and often severe, sanction of an award of prejudgment interest on the entire judgment.

This disparity offends the equal protection guarantees of the United States and Ohio Constitutions. Because the classification affects a fundamental right — the right to trial — it is subject to strict scrutiny. *Shapiro v. Thompson, supra*, 394 U.S. 618; *State v. Lane* (1979), 60 Ohio St. 2d 112, 115, 122 ("the mere possibility of deleterious effects on fundamental rights calls for close

judicial scrutiny"); *Board of Ed. v. Walter* (1979), 58 Ohio St. 2d 368, 373-74. There is no compelling governmental interest that can support the disparate treatment of plaintiffs and defendants with respect to their conduct regarding settlement. Thus, unless the statute is given a saving construction that limits its application to situations in which punishment is permissible — e.g., where a defendant lacks a reasonable basis for proceeding to trial — it offends the constitutional guarantees of equal protection.

In sum, the final sentence of the *Kalain* syllabus is constitutionally required. As this Court recognized in *Kalain*, a defendant cannot constitutionally be penalized for going to trial unless he does so in bad faith.

B. The Constitution requires that R.C. 1343.03(C) be interpreted to preclude prejudgment interest in cases in which liability is properly submitted to the jury for adjudication.

The constitution requires that the final sentence of the syllabus in *Kalain* be applied to ensure that the constitutional rights to trial and to trial by jury are not denied. This can be done only if awards of prejudgment interest under R.C. 1343.03(C) are limited to cases in which penalizing the defendant's failure to settle does not penalize the exercise of a constitutional right. That is possible, however, only if awards of prejudgment interest are limited to cases in which the defendant is not entitled to a jury determination of liability; that is, cases in which the defendant cannot withstand a motion for summary judgment or for a directed verdict on the issue of liability.

In such cases, the law concludes that, based on the evidence, no reasonable person could find in favor of the defendant. Thus,

in such cases, there is no constitutional right to insist on a trial or on by jury. *Carter-Jones Lumber Co. v. Ebler* (1958), 167 Ohio St. 189, 207. In such a case, the imposition of a punitive sanction for nonetheless proceeding to trial does not impair or punish the exercise of a constitutional right.

If, on the other hand, the defendants case survives a motion for directed verdict, or could have survived one had it been made,[11] then prejudgment interest under the statute cannot constitutionally be awarded. Under such a circumstance, by definition, the defendant's belief that he is not liable is objectively reasonable: if a reasonable juror could find for the defendant, then the defendants belief in his non-liability is, *a fortiori,* reasonable. Thus, awarding prejudgment interest against a defendant who goes to trial in a case in which the defendant survives, or could have survived, a motion for directed verdict impermissibly penalizes the constitutionally protected right to trial by jury.

C. The Award of Pretrial Interest in this Unconstitutional.

In this case, as a matter of law, defendants had a good faith, objectively reasonable belief that they were not liable. The issue of liability was properly submitted to the jury, and, therefore, by definition, reasonable minds could differ as to liability. Under that circumstance, defendants' assertion of their right to trial is constitutionally protected, and cannot be punished. The award of prejudgment interest in this case is unconstitutional.

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11. This conditional clause is essential, because, without it, the constitutional rule could be circumvented by plaintiffs merely by declining to move for a directed verdict on liability.

D. Even without reaching the constitutional question, the award of prejudgment interest in this case must be reversed because the trial court applied a standard materially at variance with *Kalain*.

The trial court failed to apply the standard of *Kalain v. Smith*. Instead, it observed that it "would be proper for a defendant to decline to make a settlement offer where a reasonably prudent trial lawyer would consider the probability of plaintiff's success to be nonexistent, or barely marginal at best. It is not prudent, however, to ignore the obvious and apparent adverse consequences of all the evidence and fail to rationally assess risks which are reasonably apparent." *Trial Court's Journal Entry and Opinion*, at 13-14 (A. 73-74).

Under the trial court's novel standard, a defendant is subject to an award of prejudgment interest for going to trial unless the chance of liability is "nonexistent, or barely marginal at best." Leaving aside the constitutional considerations that compel the conclusions advanced above, the trial court's standard is a material and impermissible departure from the settled law of this State as set forth in the syllabus of *Kalain*. On that ground alone, the trial court's judgment on prejudgment interest was erroneous, and the appellate court's affirmance of that judgment must be reversed.

* * * * *

This Court has consistently, and with increasing frequency in recent years, been called upon to protect the right to trial by jury from legislative erosion.[12] This case presents the Court with

12. *See e.g., Fantozzi v. Sandusky Cement Prod* (1992), 64 Ohio St. 3d 601; *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354; *Id.* at 357-58 (Cont'd)

the occasion and necessity of exercising that vigilance once again, to protect this indispensable right from the subtle and impermissible erosions wrought by improper awards of prejudgment interest. This Court must reverse the judgment below and affirm resoundingly that the sanctions of prejudgment interest are appropriate in certain carefully delineated circumstances, but that they may not constitutionally be applied against parties who in good faith exercise their constitutional right to trial by jury.

PROPOSITION OF LAW NO. 3

ON QUESTIONS OF CAUSATION, AN EXPERT MEDICAL WITNESS MAY TESTIFY IN TERMS OF POSSIBILITIES, AND THE EXPERT'S TESTIMONY IS NOT INADMISSIBLE ON THE GROUND THAT THE EXPERT HAS NOT TESTIFIED TO CAUSATION IN TERMS OF A MEDICAL CERTAINTY OR PROBABILITY. (*State v. D'Ambrosio*, (1993), 67 Ohio St.3d 185, approved and followed: Evid. R. 702 applied.)

At trial, defendants offered the testimony of Donald Fry, M.D., a board certified general surgeon who is the Chairman of the Department of Surgery at the University of New Mexico. Dr. Fry would have testified that the injuries to plaintiff's bile duct could have been caused by the placement of surgical clips during the gastrectomy surgery, after plaintiff had left the defendants'

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(*Douglas*, J., concurring). *See also Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76, 81 (Douglas, J., concurring and dissenting) *Morris v. Savoy, supra*, 61 Ohio St. 3d 684, 700 (Sweeney, J., concurring and dissenting).

care.[13] In particular, Dr. Fry would have testified: that the site of the bile leak was in "a high probability" for common bile duct injury during gastrectomy surgery; (R. 80-81.) that the surgery was a logical explanation for the injury; and that it was impossible to say, within a reasonable medical certainty, where the leak came from. (*Id.*)

The trial court excluded this evidence on the ground that Dr. Fry could not identify the surgery as the cause of the injury to "a reasonable medical certainty." The Court of Appeals affirmed. The exclusion of the testimony was reversible error.

First, as this Court held in *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191, there is no requirement in Ohio law that expert medical testimony be stated in terms of probabilities or certainties. Questions of probability or certainty, as the Court held, go to the sufficiency of evidence, rather than to its admissibility, and a single item of evidence need not be in itself sufficient to prove a fact in order to be admissible. The test of admissibility is, rather, simply whether the expert's testimony will " 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Id.*, quoting Evid. R. 702.[14]

Here, testimony as to possible causes of plaintiff's bile duct injury, other than that claimed by plaintiff, was obviously

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13. Dr. Fry's deposition was taken five months before trial. It is included in the Record. (R. 1-91.)

14. *D'Ambrosio* was a criminal case, and in its opinion the Court noted that a requirement of expert medical certainty was inappropriate "especially" in criminal cases. Nothing in the decision suggests, however, that the rule is *limited* to criminal proceedings. Indeed, the sole prior decision cited by the Court was a civil case, and, more importantly, the decision rested on the provisions of Evid. R. 702, which is equally applicable in both criminal and civil proceedings. *See* Evid. R. 101(A).

relevant and it would have assisted the jury in evaluating the weight to be given the testimony of plaintiff's expert regarding causation. The exclusion of the testimony solely because it failed to meet a non-existent standard of "medical certainty" was wrong.

Second, even if the rule were as the courts below thought it to be, it would not have applied to Dr. Fry's who bears the burden of proof on the issue as to which the expert testifies.[15]

This limitation of the "medical certainty" rule follows inevitably from the theory of the rule as one based on evidentiary sufficiency:

> The very reason that [possibility] testimony cannot be introduced by a plaintiff is that it is not probative inasmuch as it does not carry plaintiff's burden of proof. If a plaintiff introduces only possibilities to show causation, as a matter of law he has not met his burden of proof, but a defendant in a case

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15. *Giles v. Yellow Cab Co.* (1964), 1 Ohio App.2d 404, 407-408 (error to prevent defendant's cross-examination of expert as to whether plaintiff's injury might have been caused by arthritis, rather than by collision as plaintiff claimed); *Davis v. Sugardale Foods, Inc.* (February 24, 1982), Stark County App. No. CA 5792, unreported (A. 87) (not error to permit defense expert to testify as to other possible causes of the plaintiff's injury); *Conti v. Topolosky* (June 17, 1975), Franklin County App. No. 74AP-515, unreported (A. 79) (defense expert may testify to possible other causes). Other jurisdictions that adhere to a "reasonable medical certainty" rule for expert testimony similarly limit the rule to proofs offered by the party with the burden on the issue to which the testimony relates. *See, e.g., Dolan v. Carrier Corp.* (Pa. Super. 1993), 623 A.2d 850, 853; *Felde v. Kohnke* (1971), 184 N.W.2d 433, 441, 50 Wis.2d 168.

> does not have the burden of proof. The burden of proof was always on the plaintiff . . . , which burden never shifts during a trial. The defendant . . . did not have to prove anything. The burden is upon the plaintiff to attempt to meet her burden of proof; the defendant need simply to weaken plaintiff's attempt to meet the burden of proof. If a malpractice plaintiff has introduced evidence to show the probability of the occurrence of an event, a malpractice defendant need not be limited to showing probability that the event did not occur; instead, the malpractice defendant may be allowed to demonstrate that such probability as shown by plaintiff is neither a certainty, nor a great probability, and defendant may attempt to do this by using "possibility" evidence to chip away and destroy the evidence set forth by plaintiff.

Conti v. Topolosky, supra. See also Davis v. Sugardale Foods, Inc., supra ("There is a substantial difference between the burden imposed by the law upon a plaintiff to prove cause and affect by probability and the admissibility of evidence to refute the weight and sufficiency of such evidence.").

It would be entirely inconsistent with the idea of burdens of proof to apply the rule to require that a defendant show the *probability* of some other cause as a means of attacking the weight or sufficiency of the plaintiff's evidence on an issue. Such a rule would effectively place on the defendant the burden of disproving a matter as to which the plaintiff has the burden of

proof. Indeed, a rule that required "certainty" evidence from the defendant would arbitrarily deny the defendant an opportunity to impeach or rebut the plaintiff's case, and would amount to a denial of due process of law.

Thus, even under a "medical certainty" rule, a defendant is not limited to "certainty" evidence in rebutting the proof offered in plaintiff's case; rather, he may attack the plaintiff's case with proof of other possibilities. In the present case, then, even if the "medical certainty" rule governed expert proofs in Ohio, the courts below were mistaken in applying the rule to the testimony of Dr. Fry. The testimony was offered to rebut plaintiffs evidence as to the supposed cause of his injury, a matter as to which plaintiff bore the burden of proof, by raising the possibility of other causes of the injury. As such, the testimony was entirely within the settled rule that expert evidence of possibilities may be introduced to attack the weight or sufficiency of the "medical certainty" evidence on which the plaintiff relies.

While seeming to acknowledge this long-settled rule, the Court of Appeals effectively eviscerated it by relying on a nonsensical distinction between (a) evidence contradicting or impeaching the specific cause testified to by the plaintiff's experts (admissible in the appellate court's view as "possibility" evidence), and (b) evidence of a different cause (which the court held subject to the "probability" standard). (A. 26-28). Not surprisingly, the appellate court cited no authority adopting this purported distinction. Ohio law is, in fact, to the contrary.[16]

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16. *See, e.g., Giles, supra* 1 Ohio App.2d at 407-408, 205 N.E.2d at 88-89 (error to exclude evidence that injury was possibly caused by arthritis rather than by collision). In this case, the Court of Appeals employed its invented distinction in an effort to distinguish *Conti v. Topolosky, supra,* stating that *Conti* had permitted "possibility" evidence only to refute the plaintiff's claimed cause and not to show

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Appendix A

The appellate court's claimed distinction is in fact nonexistent. Certainly evidence of a possible cause other than that advanced by the plaintiff does two things at once: it tends to prove a different cause, and it tends to reduce the likelihood of plaintiff's claimed cause. The chief probative value of "other cause" evidence, however, and therefore the reason for its admissibility, is that it undermines the persuasive force of the plaintiff's evidence regarding cause. Thus, when offered by a defendant, there is only a semantic difference between the two forms of the statement: "the bile duct injury might not have been caused by the accident," and "the bile duct injury might have been caused by the later surgery." In either form, the essence of the statement is that it attacks the sufficiency of the plaintiff's evidence regarding cause.

Moreover, the distinction manufactured by the appellate court is inconsistent with the fundamental law of burdens, since it effectively places on the offering defendant the burden of disproving the plaintiff's claimed cause by proving the existence of a different cause. A defendant offering an alternative cause is not required to prove the alternative cause: he may introduce any evidence that undermines the weight of the "certainty" evidence introduced by the plaintiff.

Finally, even if it made sense, the appellate court's specious distinction would have been inapplicable to Dr. Fry's testimony anyway. Dr. Fry would have testified that it was "impossible" to say to a "reasonable medical probability" what had caused

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other possible causes. That description of *Conti* is, however, flatly inconsistent with the *Conti* opinion itself. *See Conti* (the party without the burden of proof may " 'attempt to upset [the plaintiff's] proof by showing *other relevant possibilities*' ") (emphasis added), *quoting Hernke v. Northern Insurance Co.* (1963), 20 Wis. 2d 352 at 360, 122 N.W. 2d 395 at 399-400.

plaintiff's bile duct injury. That testimony directly contradicted the testimony of plaintiff's expert that the accident could be identified as the cause to a reasonable medical certainty. Thus, even if testimony of the possibility of other causes were inadmissible, Dr. Fry's testimony denying the certainty of any cause (including the cause claimed by plaintiff) would have been admissible.

The exclusion of Dr. Fry's testimony was erroneous under any putative basis. The exclusion was highly prejudicial to the defendants, since it denied them an opportunity to defend on an issue that was central to their liability. This Court should correct the error and reaffirm the correct governing principles in this important area of the law of evidence.

CONCLUSION

The courts below erroneously ruled R.C. 2323.57 unconstitutional. The error was caused by a grave expansion of judicial power that led to the nullification of a thoroughly considered statute rationally designed to promote a well-documented problem of public policy. That error must be corrected. The judgments below must be reversed and the cause remanded with instructions to adhere to the mandate of R.C. 2323.57.

The courts below also applied the Ohio prejudgment interest statute in a manner that violated the defendants' right to trial by jury. That constitutional deprivation must be corrected, and the judgment imposing prejudgment interest reversed.

Finally, because the lower courts misapplied settled Ohio evidentiary law, to the material prejudice of defendants, the

judgment of liability must be reversed, and the cause remanded for new trial.

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APPENDIX B — EXCERPTS OF DEFENDANT'S REPLY BRIEF IN THE OHIO SUPREME COURT

ARGUMENT

PROPOSITION OF LAW NO. 1:

THE STATUTE PROVIDING FOR PERIODIC PAYMENT OF CERTAIN JUDGMENTS, R.C. 2323.57, IS CONSTITUTIONAL.

The trial court and the Court of Appeals in this case held that Ohio's periodic payment statute (R.C. 2323.57) violates the due process and jury trial guarantees of the Ohio Constitution. In attempting to defend these holdings, plaintiff (joined by amicus curiae) relies on the same flawed due process and jury trial theories that misled the courts below. In addition, plaintiff attacks the statute as a denial of equal protection, a ground that was not relied on by either of the courts below. Both plaintiff and amicus do contend, however, that the standard to be applied under the equal protection clauses is essentially the same as the standard under a due process analysis. *Brief of Plaintiff-Appellee,* ("Br.") at 24; *Brief of Amicus Curiae,* at 11-12. For that reason, the due process and equal protection claims are addressed together, under Proposition of Law 1(A) below (which is amended to reflect the equal protection issue). As in defendant's original Brief, the arguments regarding the right to jury trial are discussed under Proposition 1(B).[1]

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1. Amicus raises as a separate claim the proposition that the statute violates the Ohio constitutional proibition of legislatively created "special privileges". Ohio Const., art. I, § 2. This contention is not properly before the Court because it was not raised by any of the parties in any stage of the proceedings below and the claim has therefore not been preserved.

On its merits, the proposition is silly on its merits. The constitutional

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Appendix B

PROPOSITION OF LAW NUMBER 1(A):

STATE STATUTES ENJOY A STRONG PRESUMPTION OF CONSTITUTIONALITY. A PARTY WHO CLAIMS THAT A STATUTE IS UNCONSTITUTIONAL BEARS THE BURDEN OF SHOWING THAT THE STATUTE AND THE GOVERNING CONSTITUTIONAL PROVISIONS ARE CLEARLY INCOMPATIBLE. (*State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph 1 of the syllabus, approved and followed.)

R.C. 2323.57 BEARS A REAL AND SUBSTANTIAL RELATION TO THE PUBLIC WELFARE, AND IS NEITHER UNREASONABLE NOR ARBITRARY. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION PROVISIONS OF THE UNITED STATES OR OHIO CONSTITUTIONS. (*Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, followed.)

Plaintiff advances his due process and equal protection claims with essentially three lines of argument: *First*, he claims

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provision in question provides that "no special privileges or immunities shall ever be granted, *that may not be altered, revoked or repealed by the General Assembly*" (emphasis added). The provision is plainly addressed to directly legislated corporate charters, franchises and the like (a common practice in the nineteenth century). It simply assures that no Assembly can enact such grants free of re-examination by subsequent Assemblies. There could be no suggestion by anyone that the provisions of R.C. 2323.57 could not be "altered, revoked or repealed by the General Assembly" at any time that body saw fit to do so. Thus, even on its merits, this challenge to the statute is utterly meritless.

that the periodic payments statute is "an unconstitutional cap on future damages" like the one held invalid in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684 [*Br.* at 17]. *Second,* he claims there is "no evidence" of a rational relationship between periodic payments and the statute's "objective", which he insists is solely the reduction of the costs of medical malpractice insurance. [*Id.*, at 15-16]. And *third,* he argues there is no rational basis for the statutes application only to medical malpractice plaintiffs (and only to those who have received large future damages awards), and not to persons injured by other forms of tortious injury. [*Id.*, at 24-29.][2] Each of these arguments is misguided.

A. R.C. 2323.57 does not impose a "cap" on future damages.

Nothing in the statute even suggests that total damages, or any specific classes of damages, are legislatively "capped". In truth, the statute bears no resemblance at all to the "caps" on damages that this Court held unconstitutional in *Morris, supra.*

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2. Plaintiff also contends that the statute must be evaluated under the "strict scrutiny" standard because of his claim that periodic payments impair the constitutional right to trial by jury. [*Id.*, pp 23-24, 30]. As shown below, the statute has *no* impact at all on jury trial rights. It is, moreover, at odds with every decision of this Court addressing the constitutionality of various tort reform enactments, which have unfailingly rejected demands for "strict scrutiny" review. *See, e.g., Morris, supra,* 61 Ohio St. 3d 684; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270; *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300; *Beatty v. Akron City Hospital* (1981), 67 Ohio St.2d 483; *Denicola v. Providence Hosp.* (1979), 57 Ohio St.2d 115. And it is, finally, unsupported by the lone decision from elsewhere that plaintiff cites as supposedly adopting a "strict scrutiny" test. *See Carson v. Maurer* (N.H. 1980), 424 A.2d 825 (adopting, not "strict scrutiny" but an "intermediate scrutiny test). *See also Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763 (discussing the idiosyncratic character of New Hampshire's approach to equal protection analysis in this area).

Plaintiff insists, however, that the statute should be treated as if it did impose a cap, for two reasons.

First, the amount of future damages is determined in terms of present value, but the statute makes no provision for interest on periodic payments of the amount awarded. Plaintiff says this effectively reduces the amount of the award. Second, he claims that the statute creates a "windfall" reduction in damages for the defendant by terminating the obligation to pay for unaccrued noneconomic losses and medical expenses upon the death of the plaintiff. Neither of these notions has any merit.

As to interest, plaintiff is correct that the statute does not require a trial judge to include in an approved payment plan some provision for interest to accrue on deferred amounts. But it does not forbid such a provision either. In truth, under the statute, the trial court has broad discretion in fashioning a plan. R.C. 2323.57(D)(1)(d). To the extent that liability for interest on periodic payments is appropriate, the court undoubtedly has authority to include provision for it in the plan. And if, as plaintiff suggests, interest is constitutionally required, then one must assume that courts will exercise their discretion in conformity with the constitution and incorporate provisions for interest in any approved plan whenever constitutionally required.

Equally ill-founded is plaintiff's contention that damages are somehow "capped" by the statutory provision that, upon the plaintiff's death, further periodic payments need not be made for medical expenses and noneconomic losses that the plaintiff would not in fact incur. R.C. 2323.57(F)(l). Amazingly, plaintiff characterizes this as the creation of a "windfall" for the defendant. What it actually does, of course, is eliminate the windfall received, not by the defendant or even by the plaintiff,

but by the plaintiffs heirs, when the plaintiff dies sooner than the lie expectancy on which the trier of fact relied in calculating compensation for future losses.

As described in defendant's initial Brief, the inevitable disparity between future losses as projected at trial and as actually incurred is among the most widely recognized deficiencies in the traditional award of lump-sum damages.[3] It should go without saying that a primary goal of any remedial system is *accurate* compensation of the injured party. Plaintiffs contention that, in effect, he has a constitutional right to preserve the *inaccuracies* of the lump-sum judgment system is senseless.

> The object of an award of damages is to make whole a person who has suffered loss. One who has sustained a loss is not entitled to more than just compensation for the injury sustained. [Citations omitted.]
>
> [P]laintiffs' argument is that they have a right to receive a potential windfall . . . . It is true that before the statute was enacted, awards to plaintiffs contained this potential for a windfall, but we do not believe that the constitutional provisions were intended to ensure that this potential for a windfall would be inviolate.

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3. *See, e.g., American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.* (Cal. 1984), 683 P.2d 670, 676 (public interest is served by limiting a defendant's obligation to those future damages that a plaintiff actually incurs, eliminating the so-called 'windfall' obtained by a plaintiff's heirs when they inherit a portion of a lump-sum judgment that was intended to compensate the injured person for losses he in fact never sustained").

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Smith v. Superior Court (Ariz. 1992), 831 P.2d 1279, 1282.

The statute provides that payments need not be made for certain losses that are not in fact sustained by the injured party. This "cap" merely limits damages to the amount of the injured party's actual loss. This Court's language in *Morris, supra,* regarding the "double recovery" permitted by the collateral source rule applies equally to the windfall recovery at issue here: "[I]t does not appear to be unreasonable or arbitrary to deny a double recovery. Such a proposition surely does not offend fundamental fairness." 61 Ohio St. 3d at 693.

In short, the periodic payments statute does not "cap" or limit compensation in either of the ways claimed by plaintiff. It does not preclude the payment of interest, and it does not limit damages for future losses. Plaintiff's arguments to the contrary are meritless and must be rejected.[4]

B. R.C. 2323.57 is rationally related to achieving a range of Plainly legitimate legislative objectives.

Plaintiff admits that, under traditional due process and equal protection analysis, a statute must be upheld if it is rationally related to a legitimate governmental objective. [*Br.* at 15-16].

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4. Plaintiff and amicus cite to a number of cases from other states dealing with caps on damages awards. The immateriality of those decisions to the constitutionality of periodic payment legislation is evident from the fact that several of those same states have *upheld* the constitutional validity of periodic payment legislation. *Compare, e.g., Smith v. Dept. of Ins.* (Fla. 1987), 507 So.2d 1080, *and Wright v. Central DuPage Hosp. Assoc.* (Ill. 1976), 347 N.E.2d 736 (holding damages caps unconstitutional) *with Florida Patients Compensation Fund v. Von Stetina* (Fla. 1985), 474 So.2d 783, *and Bernier v. Burris* (Ill. 1986), 497 N.E.2d 763 (upholding periodic payment systems).

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Strock v. Pressnell (1988), 38 Ohio St.3d 207, 214; *Mominee, supra,* 28 Ohio St.3d 270. He mistakenly argues, however, that R.C. 2323.57 violates this standard.

The linchpin of plaintiff's arguments is his claim that the statute "has but one purpose:" to undercompensate injured parties in order to reduce medical malpractice insurance premiums. From that premise, he easily concludes that the statute serves no legitimate legislative objective. He is wrong.

As described above, plaintiff is wrong first in his claim that the statute is designed to undercompensate injured plaintiffs. The statute provides for full and immediate lump-sum awards for all losses incurred prior to the verdict, plus at least $200,000 of damages for losses not yet incurred. The balance of future damages are paid in periodic payments, except for certain future payments that become unnecessary because the loss was in fact never incurred. This provision does not undercompensate; it merely improves the accuracy of compensation.

Plaintiff is also wrong in insisting that the sole purpose of R.C. 2323.57 is to reduce the costs of medical malpractice insurance. As noted in defendants' original Brief, reducing health care costs by reducing insurance costs is plainly a legitimate legislative goal, and it was no doubt among the considerations that led to the statute's adoption. But periodic payment statutes, including those limited to particular classes of tort actions, have never had that has their sole focus.

Periodic payment statutes such as Ohio's are designed, rather, to correct a wide range of deficiencies inherent in the traditional system of lump-sum damage recoveries, including difficulties of calculation, inaccuracy of compensation,

investment risks, premature dissipation of proceeds, and inconsistency with tax policy. *See* Nat. Conf. of Comm'rs on Uniform State Laws, *Uniform Periodic Payment of Judgments Act* (1990), (quoted in defendant's original Brief at 14-15 n. 4).[5]

Plaintiff denies that the statute reflects this range of legislative objectives.[6] Based solely on a citation to an uncodified portion of the act adopting R.C. 2323.57, he insists that the statute's sole purpose is a reduction in malpractice premiums. *See Br.* at 9, *quoting* Am. Sub. H.B. 327, § 4(A). The cited provision, however, says only that stabilizing the marketplace for medical professional liability insurance "is *a* goal of the General Assembly." *Id.* (emphasis added). The quoted provision identifies "*a*" goal, not *the* goal, an identification that, by definition, acknowledges the existence of other legislative goals as well. Those other goals are set forth above, and they are well

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5. *See* Bauer, *Periodic Payment of Judgments in Ohio*, 2 Oh. Civ. Pract. J., no. 6, 158, 159 (purpose of the statute is to avoid "uncertainties and inequities inherent in lump-sum awards"). *Accord:* Darling, *Ohio Civil Justice Reform Act*, p. 150 (1987).

6. Indeed, plaintiff and amicus refuse to even acknowledge the existence of the legislative objectives identified the National Commissioners as well as by various courts and commentators. Instead, they consider the legislation's non-insurance objectives a paternalistic effort to protect injured parties from their own improvidence. *See Brief of Plaintiff-Appellee*, pp. 8-9, 19; *Brief of Amicus Curiae*, p. 7, n. 7. Concerns with accuracy of compensation, with the uncertainties of investment markets, and with tax policy have nothing to do, of course, with protecting anyone from imprudent financial management. Further, legislative concern for the possibility of improvidence by tort victims may be given the pejorative label "paternalism", but the concern for the welfare of others that undergirds much legislation is, in this case, well warranted by the available data regarding the frequent dissipation of lump-sum awards. *See Brief of Defendants-Appellants*, p. 13 n. 3 (citing empirical data on dissipation of lump-sum awards).

known and universally recognized. Plaintiff's monolithic view is wrong.

Finally, plaintiff is mistaken in his claim that " 'there is no evidence [of] a rational connection' " between periodic payment plans and the legislative objectives. *Br.* at 16, (quoting the opinion of the Court of Appeals in this case). That claim merely repeats the error of the courts below in assuming that a statute's validity depends on an empirical demonstration that it has or will achieve its intended objectives. That is not the constitutional law of this or of any other state.[7]

Judgments about the extent of particular problems and about the practicality of various possible solutions are entrusted under our constitutional system to the legislature. Neither this Court nor any other court sits as a "Supreme General Assembly" to review the wisdom, empirical soundness, or efficacy of legislative enactments. *Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St. 3d 225, 246 (Resnick, J., concurring).

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7. *See American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc.* (Cal. 1984), 683 P. 2d 670, 679, *quoting Minnesota v. Clover Leaf Creamery* (1981), 449 U.S. 456, 466 (Brennan, J.) (constitutionality does not depend on a court's assessment of the empirical success or failure of the [statute's] provisions. . . . 'Whether in fact the Act will promote [the legislative objectives] is not the question: [it is sufficient] that the [state] Legislature could rationally have decided that [it] . . . *might* [do so] . . . .' " [emphasis in original]).

Moreover, even if it were required, the empirical foundation exists. As noted in a recent study by Citizen Action (hardly a proponent of tort reform legislation), the average cost of medical malpractice insurance (adjusted for inflation) declined by almost 19 percent between 1988 and 1991. UPI Newswire *Group urges against malpractice limits*, May 16 1994. It is hardly implausible to conclude that at least some portion of the decline was directly attributable to the various reform measures (including periodic payment legislation) that were widely adopted in this country in the mid-1980's.

For that reason, an enactment must be upheld unless its provisions are wholly arbitrary or entirely unconnected to advancing the public welfare. Relative to periodic payments, no such showing has been or could be made. The deficiencies in lump-sum awards are well-known. Periodic payments directly address those deficiencies, reducing the likelihood of inaccurate compensation, mitigating investment risks, increasing the probability that compensation will be available when need and affording to tort judgments the same tax advantages that accrue under structured settlements. Neither plaintiff nor amicus curiae has offered any reason to conclude otherwise.[8]

C. R.C. 2323.57 is not unconstitutional in its application only to large verdicts in medical negligence cases.

Plaintiff's final constitutional attack on the periodic payment statute asserts that it is irrational first to apply the statute only to medical malpractice plaintiffs and not to other tort plaintiffs, and second to distinguish between plaintiffs with large future damages and those with lesser amounts.

The first part of this claim has already been addressed in defendant's original Brief. *See Brief of Defendant-Appellant,* at 15-16 n. 5. As shown, it was rational, indeed prudent, to limit the reach of an innovative legislative device to a class of cases in which large future damage awards are common and where there is a high likelihood of insurance with which to fund periodic

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8. Plaintiff relies heavily on the decision in *Kansas Malpractice Victims v. Bell* (Kan. 1988), 757 P.2d 251, apparently unaware that the relevant portions of that decision have been effectively overruled by the Kansas Supreme Court. *See Samsel v. Wheeler Tr. Serv. Inc.* (Kan. 1990), 789 P.2d 541, *and Bair v. Peck* (Kan. 1991), 811 P.2d 1176, 1191. *See Shepards Pacific Citations* (designating *Bell* as having been overruled by *Bair*).

payments. Moreover, as this Court held in *Morris, supra,* the Assembly legitimately focused its efforts at reform in the area of medical malpractice, in view of the genuine concerns about medical insurance costs. 61 Ohio St. 3d at 693, *following Denicola v. Providence Hosp.* (1979), 57 Ohio St. 2d 115.[9]

Similarly misplaced is the claim that it is irrational to distinguish between medical malpractice plaintiffs with large future damages and those with judgments for lesser amounts. A periodic payment system for small future damages awards would be pointless: the costs of administering such a plan could easily exceed the amount of the recovery itself, and concerns with investment risks, future availability of funds, and tax consequences are greatly diminished in significance when the amount in question is relatively small. The statutory distinction between larger and smaller awards thus rests on a straightforward and sensible recognition of real functional and policy differences between the two classes.[10]

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9. Indeed, this Court, in the procedural rules that it has adopted under the Constitution, has embraced precisely the distinction between medical malpractice claims and other forms of tort recovery that plaintiff now claims to be *per se* unconstitutional. *See* Evid. R. 601(D) [special rules governing Competency of expert witnesses in medical claims cases].

10. In *Morris, supra,* this Court suggested that a distinction between larger and smaller claims for noneconomic losses in medical malpractice cases might well rest on false assumptions about the existence and extent of such losses. 61 Ohio St. 3d at 692. Nonetheless, the Court held that legislative "caps" as to larger amounts could not be dismissed as resting on a wholly irrational classification. *Id.* In the case of periodic payments the distinction between large and small plainly rests on a far stronger footing than the distinction at issue in *Morris.* Thus, if the classification at issue in *Morris* survived equal protection scrutiny, a *fortiori* there can be no successful equal protection challenge to the classification at issue here.

Appendix B

PROPOSITION OF LAW NO. 1(B):

R.C. 2323.57 REGULATES ONLY THE WAY IN WHICH JUDGMENTS MAY BE ENFORCED AND DOES NOT INTERFERE WITH A PARTY'S RIGHT TO A JURY DETERMINATION OF DAMAGES. THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO JURY TRIAL. (*Lash v. Mann* (1943), 141 Ohio St. 577, paragraph three syllabus, applied and followed.)

Plaintiff claims that the periodic payments statute denies him the right to trial by jury. This contention rests on two propositions: *first*, that the statute's supposed failure to provide for interest on periodic payments effectively reduces the amount of damages awarded by the jury; and *second*, that the periodic payment of a judgment denies the plaintiff (or judgment creditor) his supposed right of immediate "access" to the damages found by the jury's verdict.

The first of these propositions has been addressed above. Contrary to plaintiff's assertions, the statute does not deny interest on periodic payments and it therefore does not reduce the amount of damages awarded by the jury.

The second part of plaintiff's jury trial claim also lacks merit. Plaintiff's sole authority for his proposition that a plaintiff has an inviolate right of immediate "access" to damages once they have been calculated by a jury is a decision of the Kansas Supreme Court that has since been overruled. *See* note 8, *supra*. This dearth of authority explains why the "decision" of the Court of Appeals in this case was reached by fiat, without explanation, analysis, or even citation.

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The decision is wrong. The statute does not alter in any way the jury's historical and constitutional role in determining and valuing the loss suffered by a plaintiff. The statute provides only for the deferred payment of a portion of the award, as determined by the jury, and the portion deferred relates to compensation for losses that the plaintiff has not yet accrued.

The regulation of when and how money judgments will be enforced has never been a part of the jury's function. Courts in Ohio and elsewhere, for example, have long had the inherent power to temporarily stay execution of money judgments "in an almost infinite variety of circumstances." *Dibert v. Ross Pattern Foundry & Devel; Co., Inc.* (Ohio App. 1957), 160 N.E.2d 862, 863; *Grussell v. Poll* (Super. Ct. 1898), 5 Ohio N.P. 439, 441. The power has been specifically applied at times to defer enforcement of judgments so that a judgment debtor could make satisfaction in installments or periodic payments. *See, e.g., Quality Carpets, Inc. v. Carter* (N.H. 1991), 587 A.2d 254; *Moskin v. Midland Bank & T. Co.* (N.Y. Sup. 1978), 409 N.Y.S.2d 327; *Royal C. Co. v. Wabash* (D.C. Mun. App. 1960), 162 A.2d 493.

Likewise, legislatures have long had and exercised the power to provide for stays, to determine when and against what property judgments could be enforced, and to require judgment creditors to defer collection temporarily. *See, e.g., Home & Loan Building Assoc. v. Blaisdell* (1934), 290 U.S. 398 (legislative moratoria of foreclosures); *Dutt v. Marion Air Cond. Sales, Inc.* (1953), 159 Ohio St. 290 (plenary legislative control of rules governing attachment and enforcement of judgment liens).

These and other limitations on the immediate enforcement of judgments all impair to a substantial degree the ability of a judgment creditor to obtain immediate "access" to the amount of damages a jury has awarded. Yet no court has ever held that the

existence of these limitations impairs the right to trial by jury. In truth, the method and timing with which money judgments are enforced has never been and is not now any part of the jury's role. Periodic payments under R.C. 2323.57, like judicial stays, do not immediate "access" to damages awards for the simple reason that there is no such right.

PROPOSITION OF LAW NO. 2:

> **THE CONSTITUTION PROHIBITS THE AWARD OF PREJUDGMENT INTEREST UNDER R.C. 1343.03 AGAINST A DEFENDANT WHO EXERCISES HIS CONSTITUTIONAL RIGHT T TRIAL BASED ON A GOOD FAITH, OBJECTIVELY REASONABLE BELIEF THAT HE IS NOT LIABLE. A PARTY'S BELIEF THAT HE IS NOT LIABLE IS OBJECTIVELY REASONABLE AS A MATTER OF LAW IF REASONABLE MINDS COULD DIFFER AS TO LIABILITY. (*Kalain v. Smith* [1986], 25 Ohio St. 3d 157 approved and followed.)**

The trial court's award of prejudgment interest departed both from constitutional requirements and from the holding in *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, by punishing defendants' good faith exercise of their constitutional rights to trial and trial by jury.[11] In response to the constitutional argument, plaintiff

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11. Plaintiff deems "novel" the proposition that the statute's interest penalty implicates constitutional rights. *Brief of Plaintiff-Appellee*, p. 31. Plaintiff apparently missed this Court's discussion of that very point in *Kalain, supra*, which set forth the express basis of the Court's holding that the statute was to be construed to avoid the mposition of an unconstitutional penalty. *See* 25 Ohio St.3d 157, at 160 n. 3 ("Appellant argues that, if required to make a monetary settlement offer when (Cont'd)

defends the facial constitutionality of the prejudgment interest statute, and fails to defend its unconstitutional application in this case. *See Br.* at 30-36.

This defense is beside the point: defendants agree that the statute as *construed in Kalain* is constitutional. Indeed, they argue that the *Kalain* holding is constitutionally compelled. The constitutional question before the Court relates to the statute as applied: whether, as happened here, the statute's punitive sanctions for going to trial can properly be imposed when reasonable minds could differ as to the defendant's liability. As described in defendants' original Brief, under the Constitution and under *Kalain,* the answer to that question must be "No". Under this circumstance, the interest sanctions cannot be imposed, because they would punish the defendants' exercise of their constitutional rights to trial and trial by jury.[12]

To the extent that plaintiff addresses this question at all, he does so simply by insisting that there is no constitutional bar to

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(Cont'd)
she has a reasonable belief that she was not liable, her right to a jury trial on the liability issue would be infringed upon because she would be forced to attempt to settle rather than having a jury determine whether she was liable"), and 160 ("Because the standard for a 'good faith effort to settle' does not require parties in all cases to make monetary settlement offers, R.C. 1343.03(C) does not infringe upon a party's right to a jury trial, as is alleged by appellant in this case").

12. "If any infringement on the right to trial by jury under the Seventh Amendment to the United States Constitution, the prohibition against infringing on the right to trial by jury in Ohio is even more strongly stated in Section 5, Article I of the Ohio Constitution." *Vance V. Roedersheimer* (1992), 64 Ohio St. 3d 552, 563 (Douglas, J., concurring and dissenting). The Seventh Amendment of the United States Constitution provides that the "right of trial by jury shall be preserved". In contrast, Article I, Section 5 of the Ohio Constitution provides that "The right of trial by jury shall be *inviolate.*" (Emphasis supplied.)

the imposition of prejudgment interest as compensation for the delays caused by resorting to trial. But even this contention is beside the point.[13]

It is surely true that, as plaintiff contends, the legislature could provide generally for prejudgment interest on all tort judgments. *Br.* at 33, *quoting Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App. 3d 222. But that power cannot be exercised selectively, particularly not when the selection turns on whether a party has exercised a right conferred by the Constitution.

The General Assembly could have chosen to make defendants generally liable for prejudgment interest, but it did not do so. Instead, it established liability only for those

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13. Plaintiff claims the statute's interference with constitutional rights is permissible because it serves a "compelling state interest." *Brief of Plaintiff-Appellee,* pp. 34-36. The supposedly "compelling" interests are "judicial efficiency," the promotion of settlements, and the compensation of those who are wrongfully denied "prompt and just compensation" for their injuries. *Id.*, p. 31. Not surprisingly, he cites no authority for his view that these interests are sufficiently compelling to warrant the denial of constitutional rights. If they were, these same compelling considerations would justify the elimination of jury trials in their entirety, along with most other constitutional rights regarding judicial procedure.

Of course there are public benefits to be obtained through legislative incentives to the settlement of litigation. Our constitutional system does not permit, however, those benefits to be purchased with the coin of individual constitutional rights. The jury system may not be speedy or efficient, but it is the system that our Constitution provides, and it has assured the integrity and legitimacy of dispute resolution for our society and its predecessors for almost a millennium. The constitutional right to demand judicial resolution of disputes is enshrined in the constitution precisely so that it cannot be taken away by short-sighted and hasty demands for more efficient or more "fair" adjudications. Punishing that right in the interest of "efficiency" is as myopic as any other incursion on such a cherished right.

defendants who insist on a judicial resolution of their case without first making a "good faith" effort at settlement. The liability is punitive, and it punishes the act of proceeding to trial.[14]

As this Court held in *Kalain,* such selective liability can be imposed only when the act of proceeding to trial is not constitutionally protected; and that occurs only when reasonable minds could not differ as to liability, because it is only in that event that the defendant has no right to trial. Plaintiff's contrary assertions simply fail to address these considerations.

Also misplaced is plaintiff's defense of the lower courts' departure from the *Kalain* standard, even apart from constitutional considerations. The trial court held a defendant could avoid liability for failing to make a settlement offer only when "the probability of plaintiff's success [is] nonexistent, or barely marginal at best." *Opinion,* at 13-14 (A. 73-74). That standard is not only indefensible under the Constitution but also violates the holding in *Kalain. Kalain,* 25 Ohio St. 3d 157, syll. ("[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer").

Obviously, even if, as plaintiff contends, the *Kalain* standard is somehow less rigorous than the constitutional standard

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14. Plaintiff insists that the statutory liability is compensatory rather than punitive. That characterization is inconsistent with the statute itself, which measures liability from the date of the cause of action, rather than from the time of the defendant's supposed unreasonable failure to settle. R.C. 1343.03(C). It is thus not compensation for the defendant's dilatory conduct at all, as this Court has long recognized. *See Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 88 n. 7 (describing prejudgment interest under the statute as a "penalty" designed to "penalize" and deter dilatory misconduct).

described above, it bears no resemblance to the trial court's "nonexistent liability" test. Indeed, that test was so far from the mark that plaintiff does not even bother attempting to defend it on its own terms. Instead, plaintiff offers an extended description of the "factual" foundation that he claims should warrant a prejudgment interest award in this case. *Br.* at 36-42.

This effort must fail. Whether prejudgment interest should be awarded is a matter committed to the discretion of trial courts *acting within the appropriate legal standards. Worrell v. Multipress, Inc.* (1989), 45 Ohio St. 3d 241. When discretion is exercised under the wrong legal standard, it is immaterial that it might have been exercised in the same fashion if the correct standard had been applied. *See, e.g., Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36.

Plaintiff's arguments cannot mask the fact that defendants were entitled to a determination of their prejudgment interest liability under a correct legal standard. Since even plaintiff cannot defend the erroneous standard adopted used by the trial court, reversal is required, apart from the constitutional considerations discussed above.

Appendix B

PROPOSITION OF LAW NO. 3:

ON QUESTIONS OF CAUSATION, AN EXPERT MEDICAL WITNESS MAY TESTIFY IN TERMS OF POSSIBILITIES, AND THE EXPERT'S TESTIMONY IS NOT INADMISSIBLE ON THE GROUND THAT THE EXPERT HAS NOT TESTIFIED TO CAUSATION IN TERMS OF A MEDICAL CERTAINTY OR PROBABILITY. (*State v. D'Ambrosio,* (1993), 67 Ohio St.3d 185, approved and followed; Evid. R. 702 applied.)

The trial court excluded certain expert testimony regarding the cause of plaintiff's injuries on the ground that the witness could not testify regarding causation to a "medical certainty" or "probability." Plaintiff does not attempt to defend the legal standard adopted by the trial court. Instead, he invents two alternative justifications for the trial courts action: *first,* that it involved a discretionary refusal to permit the witness to offer trial testimony different from that given on deposition; and *second,* that defendant failed to adequately proffer the excluded testimony. Both of these tactics are vain.

The suggestion that lack of "medical certainty" had nothing to do with the trial court's ruling is flatly contrary to the record. Indeed, the Court of Appeals did not even address it in affirming the judgment below. Plaintiff's motion to exclude the evidence in question quoted the witness's deposition testimony on the possible causes of plaintiff's injury and demanded the exclusion of "any opinion, or attempt[] to suggest" that later surgery had caused the injury. *Record,* p. 188. The stated ground of the motion was not that such an opinion would vary from the deposition testimony, but that the opinion as set forth in the deposition was "grasping for straws." *Id.,* p. 190.

Moreover, when the issue arose during the witness's testimony at trial, the trial court's reasoning was clear. As soon as the witness addressed the possibility of other sources of injury, the court sustained plaintiffs objections and admonished the witness that, in its (mistaken) view, "Doctor, possibilities are not admissible." *Id.*, at 127. *See also id.*, at 128, 131.

In short, the exclusion of the evidence in question was, as the appellate court recognized, directly founded on the trial courts mistaken notion that defendant could offer expert proof regarding other causes only if that proof was framed in terms of "probabilities" or "certainties."

Plaintiff is also mistaken in his view that defendants failed to preserve the error when they did not make a formal proffer of the excluded evidence. Plaintiff claims to derive this conclusion from the settled proposition that the grant or denial of a motion in limine is not itself a ground of appealable error because the court remains free to alter its views when the challenged evidence is presented at trial . *E. g., State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202. That rule, however, does not require a formal offer of proof at trial in order to challenge the exclusion *at trial* of the evidence in question.

Under the Rules of Evidence, claim of error may be made regarding exclusion of evidence only if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Evid. R. 103(A)(2). A formal offer of proof is required to preserve error, that is, only if the substance of the excluded evidence is not apparent from the record.

Thus, in this case, plaintiff's position might have some merit

if all that had occurred was the grant of his motion of limine. In that event, there would have been no formal exclusion of the challenged testimony at trial and hence no ruling on which to base a claim of error. In fact, however, the evidence was excluded at trial when the court sustained plaintiff's objections during the witness's testimony. The rule regarding the non-reviewability of rulings in limine is thus immaterial.

The trial court's ruling on the motion on limine does, however, provide the context that made a formal offer of proof unnecessary in this case. The motion in limine sought the exclusion of defendants' "possibility" evidence regarding cause, and set out verbatim the substance of the evidence from the witness's deposition. The motion was granted, and at trial, when the witness was examined regarding other possible causes, the trial court sustained plaintiff's objections on the ground that "possibilities are not admissible." *Record,* pp. 127, 128, 131.

On that state of the record, it cannot seriously be argued that the "substance" of the excluded testimony was unknown to the trial court or was insufficiently reflected in the record. To make such an argument, as plaintiff does, is simply to say that pointless and time-consuming formal offers of proof must be made in every case of excluded evidence, or, even less sensibly, that a formal offer must be made in any case in which evidence is excluded following an earlier grant of a motion in limine.

As the Court of Appeals itself recognized by reaching the merits of the trial court's exclusion of the evidence, neither common sense nor Evid. R. 103 requires any such rule. The error in this case was fully preserved as required by the Evidence Rules, and plaintiff's contrary contentions are wrong.

Appendix B

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and the cause must be remanded for entry of a periodic payment plan, for the vacating of the award of prejudgment interest, and for a new trial.

s/ Fritz Byers
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